161 U.S. 25-6

AGREED RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No ~~538~~ 241

JOSEPH F. HAMILTON, M. A. POST, GEORGE POST, WALTER B. HAMILTON, ET AL., PLAINTIFFS IN ERROR,

vs.

J. T. BROWN ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

FILED JUNE 12, 1893.

(15,332.)

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1 * * * * * * *

Plaintiffs' first amended original petition in lieu of original petition, which was filed on April 12th, 1890, is as follows:

In the U. S. Circuit Court at Austin, February Term, A. D. 1891.

Jos. F. Hamilton *et al.*
vs.
J. G. Brown *et al.* } No. 2189.

Comes now Jos. F. Hamilton; M. A. Post, joined by her husband, Geo. Post; Walter B. Hamilton; Elizabeth Fulton, joined by her husband, Jno. G. Fulton; J. F. Hamilton, Lewis Hamilton, plaintiffs in the above numbered and styled cause, and file this their first amended original petition, amending their original petition, filed herein on the 12th of April, 1890, and for amendment they say that the parties of whom they complain and make defendants herein are J. G. Brown, J. T. Brown, W. E. Drisdale, W. P. Darby; W. E. Drisdale and Mary C. Faires, as executors of the estate of John Drisdale, deceased; Joseph Friemel; J. E. Faires and his wife,
2 Mary C. Faires; Isaac Hamilton, Sam. Hollis, T. M. R. Hunt, Henderson Jackson, Mrs. M. C. Kirk, T. C. Karnes, G. W. Karnes, J. A. Lampe, R. M. Luck, Ed. Manton, J. C. Melcher, Emile Richers, J. Schuhmacher, F. C. Streithoff, H. Schaffner, Jacob Viebrock, Julius Willrich, J. H. Woody, J. S. Le Grand.

(1.) That plaintiff Jos. F. Hamilton is a citizen and resident of the State of Missouri; that plaintiffs Geo. Post, M. A. Post, and Lewis Hamilton are all citizens and residents of the State of Illinois; that plaintiff J. F. Hamilton is a resident and citizen of the State of Colorado, and that plaintiffs Walter Hamilton, Jno. G. Fulton, and Elizabeth Fulton are all citizens and residents of the State of Kansas, and all of the defendants herein are citizens of the State of Texas and live in the county of Fayette and within the western district of Texas.

(2.) That heretofore, to wit, on the 13th day of April, 1888, plaintiffs were the owners in fee-simple and entitled to the possession of the premises hereinafter described, situated in Fayette county as aforesaid, and of the value of thirty thousand dollars.

(3.) That the said premises so situated as aforesaid consists of one league of land, granted to Walter F. Hamilton by the Republic of Mexico on April 30th, 1831, being No. 1378, vol. 5, and known as old abstract No. 50 and new abstract No. 52, and by metes and bounds described as follows:

Situated on the left bank of the creek called Buckners creek, west of the Colorado river and above the La Bohia road, adjoining Jno. Cook's league, and from the northwest corner of a quarter league, number 4, a line was run to the west 8,055 varas to a stake;
3 thence south 4,355 varas; thence to another stake; thence east 1,876 varas to another stake, from which a post oak marked "A" bears south 55″ east 3 varas distance and another bears

south 51″ west 4 varas distance; thence north 1,250 varas to another stake; thence east 4,000 varas to another stake; thence north 250 varas to said creek, and thence, following said creek, down to another corner of said quarter league; thence north 1,800 varas, following the west line of said quarter league, to the place of beginning.

(4.) That on said April 13th, 1888, the defendants and each of them did unlawfully enter upon and dispossess plaintiff- of said premises, and have ever since said date and now withhold from plaintiffs the possession of said premises.

(5.) That said land is valuable agricultural land, and as such is reasonably worth the yearly rental of five dollars per acre, and by reason of their unlawful possession and seizure of said land defendants have deprived plaintiffs of the rents and revenues accruing thereon, which are well worth the sum of $2,000.00 per year, and which rent for two years past plaintiffs now sue for.

Wherefore, under all premises, plaintiffs pray for citation and summons in terms of the law, and that defendants and each of them be cited to appear and answer this petition, and that upon trial plaintiffs have judgment against all of said defendants for the recovery and restitution of said premises, and for rents and revenues, and for all costs, for writs of possession, and for such other relief, general and special, as in law they may be entitled, *and* etc.

WEST & McGOWN,
Att'ys for Plaintiff-, Jos. F. Hamilton et al.

4–14 (Endorsed:) No. 2189. Jos. F. Hamilton *et al. vs.* J. G. Brown *et al.* Plaintiffs' 1st am'd original petition. This action is brought as well to try title as for damages. Filed Jan. 9, 1891. D. H. Hart, clerk.

* * * * * * *

15 Thereafter, under leave of court, the defendants, Brown and others, filed a supplemental answer, which is as follows:

In the Circuit Court of the United States, Western District of Texas, 1891.

JOSEPH F. HAMILTON *et als.*
vs.
J. G. BROWN *et al.* } No. 2189.

Supplemental Answer.

And now come J. T. Brown, W. E. Drisdale; W. E. Drisdale and Mary C. Faires, executors of the will of John Drisdale, deceased; J. E. Faires and his wife, Mary C. Faires; Joseph Friemel, T. M. R. Hunt, Henderson Jackson, Mrs. M. C. Kirk, T. C. Karnes, G. W. Karnes, J. A. Lampe, Ed. Manton, J. C. Melcher, John Schuhmacher, William Luck, H. Schaffer, Jacob Vibrock, Julius Willrich, J. H. Woody, J. S. Le Grande, Mrs. J. G. Brown, and F. C. Streithoff, defendants in the above entitled and numbered cause, and, having

first obtained leave of the court to do so and in accordance with and subject to the terms and provisions of the written consent of plaintiffs' attorneys agreeing thereto, file the following special plea, to be taken and read as a supplement to the pleadings of these defendants heretofore filed herein, to wit:

And said defendants further say that plaintiffs ought not to have or maintain this action against them, because they say that on the 30th day of March, A. D. 1861, one Edward Colier, at that time the lawful district attorney of what was then the first judicial district of Texas, acting for and under authority of the State of Texas, filed in the name and by the authority of the State of Texas a petition and begun a suit in the district court of Fayette county,
16 Texas, the object and purpose of which suit was to have said district court of Fayette county declare and adjudge that the league of land described in plaintiffs' petition in this suit had escheated to the State of Texas, and to have the title to the same divested out of the said Walter Hamilton and his heirs and have it vested in the State of Texas; that in said petition plaintiff- alleged that Walter Hamilton, late a resident of Fayette county, in said State, died on the — day of ——, A. D. ——, intestate and without heirs, and that no letters of administration have ever been granted upon said decedent's estate in Fayette county in which succession should according to law have been opened; that said decedent died seized and possessed of the league of land which is described in the petition of plaintiffs in this suit and which is fully described in said petition; that said Walter Hamilton was the last person seized and possessed of said land; that there are no tenants upon said tract of land, and no person is either in actual or constructive possession of said tract of land or any part thereof, nor is there any person claiming the estate in and to said tract of land known to petitioner; that no person has paid the taxes on said land or any part thereof; that the estate in and to said tract of land has escheated to the State of Texas, and praying for the grant of writ of possession in and to said tract of land to said State; that afterwards, to wit, on the 18th day of May, 1861, the said district court of Fayette county, Texas, made an order in said suit and caused it to be enrolled in the minutes of the said court, commanding the publication for four successive weeks in a newspaper printed in the State of Texas of a notice setting forth the substance of the allegations of said petition
17 and requiring all persons interested in the estate of said Walter Hamilton to appear and show cause at the next term of said court why the said league of land should not be vested in the State of Texas; that pursuant thereto a notice setting forth at length said order and the substance of said petition was issued by the clerk of said court and published, as required by law, for four successive weeks in a weekly newspaper called the New Era, printed and published in La Grange, in Fayette county, Texas; that sundry persons introduced in said suit and set up claims to parts of said league of land; that said suit was continued from — term of said court until the July term thereof in 1871, when there was a trial had and judgment entered there to the effect that the league

of land in controversy in this suit is escheated unto the State of Texas; that the title thereto is divested out of the said Walter Hamilton and his heirs and forever vested in the State of Texas. A true and correct copy of said judgment, certified to under the hand and seal of the clerk of the district court of Fayette county, Texas, is hereto attached, marked Exhibit M, and is made a part hereof. That said judgment has never been reversed or vacated, but now remains in full force and effect; that by and because of said judgment the said Walter Hamilton and all persons claiming through or under him are estopped from and barred of the right to have or maintain this action for the recovery of said land.

And these defendants further say that afterwards, to wit, on the 7th day of August, 1872, pursuant to the commands of said judgment, the clerk of the district court of Fayette county, Texas, issued and delivered to the sheriff of Fayette county, Texas, an order of sale commanding him to seize the said league of land and
18 sell it in manner as directed in the said judgment and make disposition of the proceeds arising from the sale as provided therein; that said land was so seized and sold by said sheriff, and that these defendants and those under whom they claim became the purchasers of the parts of said league claimed by them at such sale, paid the amounts of their respective bids to the said sheriff, and received from him deeds conveying the same to them; that for this reason, also, these defendants say that said plaintiffs are estopped from and barred of the right to have or maintain this action.

Wherefore these defendants pray as in their former pleas, and that plaintiffs take nothing by this suit, and that they be discharged with their costs.

T. W. GREGORY &
BROWN, LANE & JACKSON,
Att'ys for said Def'ts.

THE STATE OF TEXAS
vs.
WALTER HAMILTON. } No. 1663. Escheat.

Heretofore, to wit, on the — day of July, 1871, this cause came on to be heard, when the plaintiff appeared, by att'y, and announced ready for trial. The defendants failed to appear, but made default, and the intervenors, J. G. Brown, J. J. Short, Wm. Short, and —— Short, appeared, by attorneys, and announced ready for trial.

Thereupon came a jury of good and lawful men, viz., G. J. Penn and eleven others, who, having heard the evidence, argument of counsel, and charge of the court, retired to consider of their verdict and returned the following, to wit:

"We, the jury, find in favor of plaintiff.

G. J. PENN, *Foreman.*"

19 EXHIBIT M.

It is thereupon ordered, adjudged, and decreed by the court that the league of land described and set forth in plaintiff's petition as

follows, to wit: Lying and being situated in the county of Fayette, on the left bank of what is called Buckners creek, to the west of the Colorado and above the La Bahia road, and joins with the league of John Cooke, and from the N. W. corner of a quarter league, numbered 4, a line was run to the west *of* 8,055 varas to a landmark; from thence south 4,350 varas to another landmark, from which a post oak, marked A, bears 55° east 3 varas, and another post oak bears 51° west 4 varas; from thence north 1,250 varas to another landmark; from thence east 4,000 varas to another landmark; from thence north 250 varas to the aforesaid creek; from thence down said creek, with its meanders, to another corner of the aforesaid quarter league, and from thence north 1,800 varas, following the western line of said quarter to the place of beginning, be, and the same is hereby, declared escheated unto the State of Texas, and the title thereto is hereby divested out of the said Walter Hamilton, his heirs and assigns forever, and vested in the State of Texas. It is further ordered by the court that the clerk of this court do issue a writ, directed to the sheriff of Fayette county, Texas, commanding him, the said sheriff, to seize and sell the above-described league of land as under execution, without appraisement, for cash in United States currency, on the first Tuesday in some month, after giving notice of sale as the law directs, in lots of not less than ten nor more than forty acres, and turn over the proceeds of said sale, after deducting therefrom the expenses and costs of the same, to the comptroller of public accounts for the State of Texas, taking therefor his duplicate receipt, one of which he shall file among the papers of this cause. It is further ordered by the court that the plaintiff, The State of Texas, do have and recover of the intervenors herein, to wit, J. G. Brown, J. J. Short, Wm. Short, and —— Short, her costs of suit in this behalf had and expended, for which execution may issue. It is further ordered that the costs incurred herein by the plaintiff be taxed against the State of Texas and certified by the clerk of this court to the comptroller of public accounts, to be paid by the treasurer upon the warrant of said comptroller.

20–26

THE STATE OF TEXAS, }
County of Fayette. }

I, John B. Holloway, clerk of the district court in and for the said county of Fayette, do hereby certify that the above and foregoing writing contains a true and correct copy of the judgment entered on the minutes of said court, as appears in Minute Book "K" of said court, on page- 365 & 366, in the above styled and numbered cause.

Given under my hand and seal of office, at office, in the [SEAL.] city of La Grange, Texas, this the 14th day of March, A. D. 1891.

JOHN B. HALLOWAY,
Clerk District Court Fayette County, Tex.

(Endorsed:) No. 2189. Jos. F. Hamilton *et al. vs.* J. G. Brown *et al.* Def'ts' supplemental answer. Filed March 30, 1891. D. H. Hart, clerk.

27 * * * * * * *

And afterwards, to wit, on July 6, 1891, under leave of court, plaintiffs filed their first amended 2nd supplemental petition; which is as follows:

In the United States Circuit Court for Western District of Texas, at Austin.

Jos. F. Hamilton *et al.* vs. J. G. Brown *et al.* } No. 2189.

Come now the plaintiffs in the above numbered and styled cause, leave of the court being first had, by their attorneys, and file this their amended 2nd supplemental petition in lieu of their 2nd sup'l petition filed herein on the 30th day of March, A. D. 1891, and for such amendment they say:

1. They demur to the first supplemental answer of the defendants, filed herein on the 30th day of March, A. D. 1891, and say the same is insufficient in law and sets up no valid defence to plaintiffs' suit, and upon this their general demurrer they pray the judgment of the court.

2. Specially excepting to said 1st sup'l answer, plaintiffs say:

(*a.*) The escheat proceedings and final judgment obtained therein, set out in defendants' said answer, were begun and prosecuted under and by virtue of an act of the legislature of the State of Texas entitled "An act to provide for vesting in the State escheated property," passed March 20, 1848, there being at the date of filing of said escheat proceedings no other law or statute authorizing escheats; which said act was repealed and annulled by the constitution of the State of Texas of 1869, long prior to the date when the escheat judgment plead and relied upon by defendants to defeat plaintiffs' title was obtained, in this, that the law of 1848, sect. 11, pro-

28 vides that the sheriff of proper county shall seize the real estate escheated to the State and sell the same in the manner therein provided, while the constitution of 1869, art. 4, sect. 20, provides that the comptroller of the State "shall take charge of all escheated property, keep an accurate account of all monies paid into the treasury and of all lands escheated to the State;" which provisions are contradictory and conflicting.

(*b.*) And plaintiffs further say that if said escheat act of 1848 was not repealed and annulled entirely that then sect. 11 thereof, being art. 3667 of Pasc. Dig., which reads as follows: "A writ shall be issued to the sheriff of the proper county commanding him to seize such estate vested in the State; and if the same be personal property or real estate he shall dispose thereof at public auction in a manner provided by law for the sale of property under execution,"

was, by said constitution of 1869, art. 4, sect. 20, which provides that the comptroller of the State "shall take charge of all escheated property, keep an accurate account of all moneys paid into the treasury and of all lands escheated to the State," repealed and annulled, and, there being no other provisions in said act by which compensation is made to the heirs of the intestates whose property has been escheated, the balance of the said act is not self-acting and is one of confiscation, and therefore in violation of the fifth amendment of the Constitution of the United States and sect. 14 of the bill of rights of the constitution of 1869.

(*c*.) And plaintiffs further say that if said act of March 20, 1848, was not wholly repealed by the constitution of 1869, as above plead, then that the act of March 20, 1848, and especially after sect. 11 thereof, was repealed by the constitution of 1869, which
29 & 30 alone provides for compensation to the heirs owning the escheated property, was and is in contravention and violation of sect. 10, art. 1, of the Constitution of the United States of America, which provides that "no State shall pass any bill of attainder or law impairing the obligation of contracts," in that said law impairs the obligation of the contract between the State of Texas and Walter F. Hamilton and his heirs by virtue of the grant under which they hold said land, and seeks to forfeit or confiscate the private property of said Hamilton, the land, by appropriating it to the common fund without making due compensation therefor.

And upon these their special exceptions plaintiffs ask the judgment of the court.

As in duty, &c.

WEST & McGOWN,
Attorneys for the Plaintiffs.

(Endorsed:) No. 2189. Jos. F. Hamilton *et al. vs.* J. G. Brown *et al.* Plaintiffs' 1st am'd 2d sup'l petition. Filed July 6, 1891. B. G. Duval, clerk, by D. H. Hart, deputy.

* * * * * * *

31 And thereafter, to wit, on same day, July 18th, plaintiffs' counsel filed bill of exception No. 2, the same having been approved by the judge presiding. Said bill is as follows:

In the United States Circuit Court for the Western District of Texas, at Austin.

Jos. F. Hamilton *et al.* *vs.* J. G. Brown *et al.* } No. 2189.

Be it remembered that on the 18th day of July, 1891, this cause came on for trial and there came on for hearing first the plaintiffs' 1st amended second supplemental petition, filed July 6th, 1891, which supplemental petition presented general demurrer and special exceptions (*a*), (*b*), and (*c*), which demurrer and exceptions raised

issues as to the sufficiency of the defendants' supplemental answer, filed Mar. 30, 1891, and which are as follows:

Come now the plaintiffs in the above numbered and styled cause, leave of the court being first had, and by their attorneys, and file this their 1st amended 2nd supplemental petition in lieu of their second supplemental petition, filed herein on the 30th day of March, A. D. 1891.

And for such amendment they say:

1. They demur to the first supplemental answer of the defendants, filed herein on the 30th day of March, A. D. 1891, and say the same is insufficient in law and sets up no valid defence to plaintiffs' suit; and upon this their general demurrer they pray the judgment of the court.

2. Specially excepting to said 1st sup'l answer, plaintiffs say:

(*a.*) The escheat proceedings and final judgment obtained therein, set out in defendants' said answer, were begun and prosecuted under and by virtue of an act of the legislature of the State
32 of Texas entitled "An act to provide for the vesting in the State escheated property," passed March 20, 1848, there being at the date of filing of said escheat proceedings no other law or statute authorizing escheats, which said act was repealed and annulled by the constitution of the State of Texas of 1869, long prior to the date when the escheat judgment plead and relied upon by defendants to defeat plaintiffs' title was obtained, in this, that the law of 1848, sec. 11, provides that the sheriff of the proper county shall seize the real estate escheated to the State and sell the same in the manner therein provided, while the constitution of 1869, art. 4, sect. 20, provides that the comptroller of the State "shall take charge of all escheated property, keep an accurate account of all monies paid into the treasury and of all lands escheated to the State;" which provisions are contradictory and conflicting.

(*b.*) And plaintiffs further say that if said escheat act of 1848 was not repealed and annulled entirely, then that sect. 11 thereof, being article 3667 of Pasc. Dig., which reads as follows: "A writ shall be issued to the sheriff of the proper county commanding him to seize such estate vested in the State, and if the same be personal property or real estate he shall dispose thereof at public auction in a manner provided by law for the sale of property under execution," was by said constitution of 1869, art. 4, section 20, which provides that the comptroller of the State "shall take charge of all escheated property, keep an accurate account of all monies paid into the treasury and of all lands escheated to the State," repealed and annulled, and, there being no other provisions in said act by which compensation is made to the heirs of the intestates whose property has been escheated, the balance of the said act is not self-acting
33 and is one of confiscation, and therefore in violation of the fifth amendment to the Constitution of the United States and section 14 of the bill of rights of the constitution of 1869.

(*c.*) And plaintiffs further say that if said act of March 20, 1848, was not wholly repealed by the constitution of 1869, as above plead, then that the act of March 20, 1848, and especially after sect. 11

thereof was repealed by the constitution of 1869, which alone provided for compensation to the heirs owning escheated property, was and is in contravention and violation of sect. 10, art. 1, of the Constitution of the United States of America, which provides that "No State shall * * * pass any bill of attainder * * * or law impairing the obligation of contracts," in that said law impairs the obligation of the contract between the State of Texas and Walter F. Hamilton and his heirs, by virtue of the grant under which they hold said land, and seeks to forfeit or confiscate the private property of said Hamilton, the land, by appropriating it to the common fund without making due compensation therefor.

And upon these their special exceptions plaintiffs ask the judgment of the court.

And the court, after hearing and considering the same, overruled said general demurrer and special exceptions; to which ruling of the court the plaintiffs in open court then and there excepted, and now here tender this their bill of exception and ask that the same be signed, sealed, and made a part of the record in this cause, which is now here accordingly done.

Agreed to July 18, 1891.

BROWN, LANE & JACKSON,
T. W. GREGORY,
Att'ys for Defendants.
WEST & McGOWN,
Att'ys for Plaintiffs, Hamilton et als.

34–36 Examined and allowed this the 18th day of July, A. A. 1891.

T. S. MAXEY, *Judge.*

(Endorsed:) No. 2189. Jos. F. Hamilton *et al. vs.* J. G. Brown *et al.* Bill of exceptions No. 2. Filed July 18, 1891. B. G. Duval, clerk, by D. H. Hart, deputy.

* * * * * * *

37 Afterwards, on 12th day of February, 1892, there was entered up the following order on said motion:

Jos. F. Hamilton *et al.*
vs.
J. G. Brown *et als.* } 2189.

On this the 12th day of February, A. D. 1892, in the above styled and numbered cause there came on to be heard the application of the plaintiffs to amend the judgment heretofore entered in this cause on the 18th day of July, 1891; and it appearing to the court that defendants, through counsel, had accepted service of the said application and in nowise objecting to same, it is therefore ordered that said judgment be corrected to read as follows:

In Cir. Court of U. S. for West. Dist. of Texas, at Austin, July Term, 1891, on Law Side.

Jos. F. Hamilton *et al.*
vs.
J. G. Brown *et al.*
No. 2189.

On this the 18th day of July, A. D. 1891, came on to be heard the above entitled and numbered cause; and the plaintiffs and all the defendants save Sam. Hollis, W. P. Darby, and Isaac Hamilton being present in court, by their respective attorneys, the plaintiffs dismissed without prejudice their action as to said Sam. Hollis, W. P. Darby, and Isaac Hamilton, said parties not having been served with process, and the plaintiffs and all the
38 remaining defendants having announced ready for trial and by written agreement waived a jury, plaintiffs presented to the court their first amended second supplemental petition filed July 6th, 1891, containing their general and special demurrers to the defence set up in said defendant's first supplemental answer filed March 30th, 1891, and submitted said demurrers to the court, and argument of counsel for plaintiffs and defendants having been heard and duly considered by the court, it is ordered, adjudged, and decreed by this court that said demurrers be, and the same are hereby, overruled, and, the court having overruled said exceptions and demurrers, plaintiffs thereupon refused to introduce any evidence whatever to support their cause of action. Therefore judgment is hereby rendered for said defendants, J. T. Brown, W. E. Drisdale; W. E. Drisdale and Mary C. Faires, as executors of the estate of John Drisdale, deceased; Joseph Freimel, J. E. Faires, Mary C. Faires, wife of J. E. Faires; T. M. R. Hunt, Henderson Jackson, Mrs. M. C. Kirk, T. C. Karnes, C. W. Karnes, J. A. Lambe, Ed. Manton, J. C. Melcher, Jno. Schuhmacher, William Luck, H. Schaffner, Jacob Vibrock, Julius Willrich, J. H. Woody, J. S. Le Grande, Mrs. J. G. Brown, F. C. Streithoff, and Emile Rickers, and this court hereby orders, adjudges, and decrees that plaintiffs, to wit, Jos. F. Hamilton, M. A. Post, Geo. Post, Walter B. Hamilton, Elizabeth Fulton, Jno. G. Fulton, J. F. Hamilton, and Lewis Hamilton, take nothing by their suit as to said defendants, and that said defendants go hence without day and recover against and from plaintiffs and the sureties on their cost bond all their costs in this behalf expended, and that defendants have execution issued for same against plaintiffs and Jno. W. Maddox and F. M.
39–44 Maddox, sureties on their cost bond; to which rulings of the court, both on the general demurrer and special exceptions as hereinbefore set out in this decree, and to the final judgment in this cause plaintiffs duly excepted in open court.

* * * * * * *

45–47 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the circuit court of the United States, 5th circuit, in and for the western district of Texas, holding sessions at Austin, in said district, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said circuit court, before you, between Jos. F. Hamilton, M. A. Post, joined by her husband, Geo. Post; Walter B. Hamilton, Elizabeth Fullton, joined by her husband, Jno. G. Fulton; J. F. Hamilton, and Lewis Hamilton, who are plaintiffs, and J. T. Brown, W. E. Drisdale, W. E. Drisdale and Mary C. Faires, as executors of the estate of Jno. Drisdale, deceased; Joseph Friemel, J. E. Faires, Mary C. Faires, wife of J. E. Faires; T. M. R. Hunt, Henderson Jackson, Mrs. M. C. Kirk, T. C. Karnes, G. W. Karnes, J. A. Lampe, Ed. Manton, J. C. Melcher, Jno. Schumacher, Wm. Luck, H. Schaffner, Jacob Vibrock, Julius Willrich, J. H. Woody, J. S. Le Grande, Mrs. J. G. Brown, F. C. Streithoff, and Emil Richers, who are defendants, being cause No. 2189, law, on the docket of said circuit court of the United States, sitting at Austin, in said district, a manifest error hath happened, to the great damage of the said Jos. F. Hamilton, M. A. Post, Geo. Post, Walter B. Hamilton, Elizabeth Fulton, Jno. G. Fulton, J. F. Hamilton, and Lewis Hamilton, who are plaintiffs in error herein, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court, the — day of March, in the year of our Lord one thousand eight hundred and ninety-three, and seal — our said circuit court at Austin, in the 117th year of the Independence of the United States.

[The Seal of the U. S. Circuit Court, Western Dist. Texas, Austin.]

B. G. DUVAL,
Clerk of the Circuit Court of the United States,
West. Dist. of Texas, at Austin,
By D. H. HART, *D'y.*

Allowed this March 20, 1893.

T. S. MAXEY, *Judge.*

[Endorsed:] No. 2189. In Supreme Court of the United States. Jos. F. Hamilton *et als.*, pl'ffs in error, *vs.* J. G. Brown *et als.*, def'ts in error. Writ of error to the Supreme Court of the United States. Issued 20 day of M'ch, A. D. 1893. B. G. Duval, clerk, by D. H. Hart, d'y.

* * * * * * *

48 On March 20th, 1893, the assignment of errors on part of plaintiffs in error was filed, the same being as follows:

In U. S. Cir. Court for West. Dist. of Texas, Austin Division.

J. F. HAMILTON *et al.* } No. 2189. Law.
vs.
J. G. BROWN *et al.* }

In error to U. S. Sup. Court.

Now come the plaintiffs in error, J. F. Hamilton, M. A. Post, Geo. Post, Walter B. Hamilton, Elizabeth Fulton, Jno. G. Fulton, Jos. F. Hamilton, and Lewis Hamilton, and respectfully submit and assign for error as follows:

1. That said circuit court erred in overruling plaintiffs' first amended second supplemental petition, filed July 6, 1891, which supplemental petition presented a general demurrer and special exceptions to the sufficiency of the defendants' supplemental answer filed March 30, 1891, as fully appears by plaintiffs' bill of exceptions approved and filed July 18, 1891, and a part of the record of this cause.

2. The circuit court erred in holding that the escheat proceedings set out in defendants' first supplemental answer, wherein it was averred that the title to the land in controversy in this suit had been divested out of Walter B. Hamilton, under whom plaintiffs claim as heirs, barred these plaintiffs of any further interest in said land, and especially that said escheat proceedings were sufficient to show an outstanding title against plaintiff-, so as to prevent their recovering in this action.

3. The circuit court erred in not holding that the escheat proceedings and final judgment obtained therein, as set out in the defendants' first supplemental answer, were without the warrant and authority of any law in force in the State of Texas
49 at the time said proceedings and judgment were had, the fact being that there was no law in Texas in force at that time by which real property could be escheated.

4. The circuit court erred in not holding that the act of March 20, 1848, of the legislature of the State of Texas, under which the escheat proceedings and judgment relied upon by defendants to bar plaintiffs' action were begun and prosecuted, had not been repealed and annulled by the constitution of the State of Texas, which went into effect in July, 1869, and especially in not holding that said act of March 20, 1848, was a nullity in this, that said law of 1848, sec.

11, provides that the sheriff of the proper county shall seize and sell the real estate escheated to the State and sell the same in the manner therein provided, while the constitution of 1869, art. 4, sec. 20, provides that the comptroller of the State "shall take charge of all escheated property, keep an accurate account of all moneys paid into the treasury and of all lands escheated to the State," which provisions are contradictory and conflicting.

5. Said circuit court erred in not holding that sec. 11 of said act of March 20, 1848 (Pas. Dig., art. 3667), which reads as follows: "A writ shall be issued to the sheriff of the proper county commanding him to seize such estate vested in the State, and if the same be personal property or real estate he shall dispose thereof at public auction in the manner provided by law for the sale of property under execution," was by said constitution of 1869, art. 4, sec. 20, which provides that the comptroller of the State "shall take charge of all escheated property, keep an accurate account of all moneys paid into the treasury and of all lands escheated to the State," repealed and annulled; and, there being no other provisions
50–52 in said act by which compensation is made to the heirs of an intestate whose property has been escheated, the balance of said act is not self-acting and is one of confiscation and therefore in violation of the fifth amendment to the Constitution of the United States and sec. 14 of the bill of rights of the constitution of 1869 of the State of Texas.

6. Said circuit court erred in not holding that the act of March 20, 1848, under which said escheat proceedings relied on in supplemental answer of defendants was not in contravention and violation of sec. 10, art. 1, of the Constitution of the United States, which provides that "no State shall pass any law * * * impairing the obligations of contract" in this, that said law impairs the obligations of the contract between the State of Texas, the successor in sovereignty of the Republic of Mexico, and Walter F. Hamilton and his heirs by virtue of the grant under which they hold said land, and seeks to forfeit and confiscate the private property of said Hamilton and his — by appropriating it to the common fund without making due and adequate compensation therefor.

Wherefore, by reason of the errors hereinbefore complained of, the plaintiffs in error pray that the said judgment may be reversed and this court render such judgment as under the record is just and proper.

FLOYD McGOWN,
WEST & COCHRAN,
Att'ys for Jos. F. Hamilton et als., Plaintiffs in Error.

(Endorsed:) No. 2189. Law. Jos. F. Hamilton *et als. vs.* J. G. Brown *et als.* Assignment of errors of plaintiffs in error. Filed M'ch 20, 1893. B. G. Duval, clerk, by D. H. Hart, deputy.

53 J. F. HAMILTON *et al.*, Plaintiffs in Error,
vs.
J. G. BROWN *et al.*, Defendants in Error. } No. 948.

Pending in the United States Supreme Court on writ of error from the U. S. circuit court for the western district of Texas.

Come now the parties hereto, acting by and through their counsel, and agree as follows: That for the purposes of this writ of error only the following parts of the record in this cause need be printed:

I. Plaintiffs' first amended original petition, which was filed on January 9th, 1891, to be found at pages 1–4 of the transcript.

II. Defendants' first supplemental answer, to be found at pages 15 to 20 of the transcript, including "Exhibit M," which answer was adopted by Elise and Emile Richers (Transcript, p. 22).

III. Plaintiffs' first amended second supplemental petition, to be found at pages 27 to 29 of the transcript.

IV. Plaintiffs' bill of exceptions No. 2, to be found at pages 31 to 34 of the transcript.

V. Judgment as amended, to be found at pages 37 and 38 of the transcript.

VI. Writ of error, to be found at page 45 of the transcript, and assignment of errors, to be found at pp. 48 to 50 of the transcript.

The object and purpose of this agreement is to save costs, and in order that this case may be presented to the court in as expeditious and clear a manner as possible.

A. E. BARNARD,
Att'y for Pl'ff in Error.
S. R. FISHER,
For Defendants in Error.

[Endorsed:] J. F. Hamilton *et al. vs.* J. G. Brown *et al.* Agreement as to printing record.

[Endorsed:] Case No. 15,332. Supreme Court U. S., October term, 1893. Term No., 948. Joseph F. Hamilton *et al.*, pl'ffs in error, *vs.* J. T. Brown *et al.* Stipulation as to printing record. Filed Jan'y 4, 1894.

Endorsed on cover: Case No. 15,332. W. Texas C. C. U. S. Term No., 538. Joseph F. Hamilton, M. A. Post, George Post, Walter B. Hamilton, *et al.*, plaintiffs in error, *vs.* J. T. Brown *et al.* Filed June 12th, 1893.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK.

No. ~~538~~. 241

Supreme Court of the United States.

OCTOBER TERM, 1894.

JOS. F. HAMILTON ET ALS., PLAINTIFFS IN ERROR,

vs.

J. G. BROWN ET ALS., DEFENDANTS IN ERROR.

In Error to the Circuit Court of the United States for the Western District of Texas.

BRIEF AND ARGUMENT IN BEHALF OF JOS. F. HAMILTON AND OTHERS, PLAINTIFFS IN ERROR FOR SUBMISSION UNDER RULE 20 OF THIS COURT.

H. E BARNARD,
FLOYD McGOWN,
WEST & COCHRAN,
Attorneys for Plaintiffs in Error, Jos. F. Hamilton and Others.

HUTCHINGS PRINTING CO, AUSTIN.

No. 538.

Supreme Court of the United States.

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JOS. F. HAMILTON ET ALS., PLAINTIFFS IN ERROR,

vs.

J. G. BROWN ET ALS., DEFENDANTS IN ERROR.

In Error to the Circuit Court of the United States for the Western District of Texas.

BRIEF AND ARGUMENT IN BEHALF OF JOS. F. HAMILTON AND OTHERS, PLAINTIFFS IN ERROR FOR SUBMISSION UNDER RULE 20 OF THIS COURT.

STATEMENT OF THE CASE.

This action was instituted in the United States Circuit Court for the Western District of Texas, Austin division, by the plaintiffs in error, to recover a league of land situated in Fayette county, Texas, originally granted to Walter Hamilton by the Republic of Mexico, on April 30, 1831. The action was brought in the ordinary form of trespass to try title as prescribed by the laws of Texas. The defendants answered by a general demurrer, plea of not guilty and special pleas. It will be unnecessary, however, to set out at length these various pleas in as much as on the final disposition of the case the issues raised by them were not passed on by the court.

The only matters for the decision of this court are embraced in a supplemental answer in the nature of plea of estoppel relied on by the defendants. In substance in this plea defendants allege that Edward Colier, the district attorney, acting under authority of the State of Texas, begun in the name of the State in

the District Court of Fayette county, a suit whose object and purpose was to have said court adjudge that the Hamilton league had escheated to the State of Texas, and to have the title to said league divested out of Walter Hamilton and his heirs, and have it vested in the State of Texas. The petititon in that case alleged that Walter Hamilton, late a resident of Fayette county, died on — day of —, A. D. —, intestate and without heirs, and that no letters of administration had ever been granted upon said Hamilton's estate, in Fayette county, in which county the succession according to law should have been opened, and that decedent died the owner of the league of land involved in this suit; that there are no tenants upon said tract of land and no person in actual or constructive possession of any portion of the land, nor is there any person claiming the estate in and to the same or paying taxes thereon, and that the estate in said land has escheated to the State of Texas, and there is a prayer for writ of possession. That afterwards on May 18, 1861, the District Court of Fayette county entered up an order of publication in said suit, commanding the publication for four successive weeks in a newspaper printed in the State of Texas, setting forth the substance of the allegations of said petition requiring all persons interested in the estate of Walter Hamilton to appear and show cause why the said league of land should not be vested in the State of Texas, and that pursuant to said order, a notice was regularly issued and published for the required time in a newspaper called the "LaGrange New Era;" that sundry persons intervened in said suit and set up claims to parts of said league; that said suit was continued from term to term until July term, 1871, when there was a trial had and judgment entered to the effect "that the Hamilton league is escheated to the State of Texas; that the title thereto is divested out of Walter Hamilton and his heirs and forever vested in the State of Texas;" that said judgment has never been reversed or vacated, but remains in full force, and that because of said judgment, Walter Hamilton and all persons claiming, through or under him, are estopped from and barred of the right to have or maintain this action for the recovery of said land. (Agreed Record, pp. 2 *et seq.*)

In this plea defendants further alleged that on August 7, 1872, pursuant to said judgment, an order of sale issued to the sheriff of Fayette county, commanding him to seize and sell said land

for cash as under execution without appraisement as the law directs in lots of not less than ten nor more than forty acres, and turn over the proceeds of the sale, after deducting costs, to the comptroller of public accounts for the State of Texas; that said land was sold by said sheriff and that these defendants and those under whom they claim became the purchasers of parts of said league claimed by them, paid for same, and received from the sheriff deeds conveying same, and that for this reason also plaintiffs are estopped from claiming said land or any part thereof. To this plea is attached as an exhibit the judgment. (Agreed Rec., p. 4.)

To this plea of estoppel, the plaintiffs in error, urged a general demurrer and by two special exceptions claimed that the matters therein contained in nowise affected their title because:

1st. The escheat proceedings and final judgment obtained therein were begun and prosecuted under an act of the Legislature of the State of Texas, entitled "An act to provide for vesting in the State escheated property," passed March 20, 1848, there being at the date of the filing of said escheat proceedings no other law or statute authorizing escheats, and that this act was repealed and annulled by the Constitution of Texas of 1869, prior to the date when the escheat judgment plead and relied upon by defendants to defeat plaintiffs. title was obtained; in this, the law of March, 1848, Sec. 11, provides that the sheriff of the proper county shall seize the real estate escheated to the State, and sell the same in the manner therein provided, while the Constitution of 1869, Art. 4, Sec. 20, prescribes a different mode, viz: that the Comptroller of the State "shall take charge of all escheated property, keep an accurate account of all moneys paid into the treasury, and *all lands escheated* to the State," which provisions are contradictory and conflicting.

2nd. That if the escheat act of 1848 was not repealed and annulled entirely, then said Sec. 11 thereof (Pas. Dig., Art. 3667) which reads as follows: "A writ shall be issued to the sheriff of the proper county commanding him to seize such estate vested in the State; and if the same be personal property or real estate, he shall dispose thereof at public auction, in a manner provided by law for the sale of property under execution," was by the Constitution of 1869, Art. 4, Sec. 20, which provides that the Comptroller of the State "shall take charge of all escheated

property, keep an accurate account of all moneys paid into the treasury, and of all lands escheated to the State," repealed and annulled, and there being no other provisions in said act by which compensation is made to the heirs of the intestate, whose property has been sought to be escheated, the balance of said act is not self-acting, and is one of confiscation, *being in violation of the fifth amendment of the Constitution of the United States*, and of section fourteen of the Bill of Rights of the Texas Constitution of 1869, in force at the time the judgment was rendered.

March 30, 1891, the court below overruled these exceptions, and to this action of the court plaintiffs reserved a bill.

On July 6, 1891, plaintiffs in error, by a pleading termed in the Texas practice a First Amended Second Supplemental Petition, renewed their former objections to the plea of estoppel, and in addition, urged that if the act of March 20, 1848 (escheat act) was not wholly repealed by the Constitution of 1869; that said act, and especially Sec. 11 thereof, was repealed by said Constitution of 1869, which alone provides for compensation to the heirs owning the escheated property, and is in violation of Sec. 10, Art. 1, of the Constitution of the United States, which, amongst other things, provides that no State shall impair the obligation of contracts, and that said law impairs the obligation of the contract between the State of Texas and Walter Hamilton and his heirs by virtue of the grant under which they hold the land and seek to forfeit and confiscate the property of said Hamilton by appropriating it to the common fund without making due compensation therefor. (Agreed Rec., p. 6.) These grounds for demurrers and special exception were by the court below overruled and bill of exceptions again reserved. (Agreed Rec., p. 9.) When the case was regularly called the plaintiffs in error, through counsel, declined to introduce any evidence declaring that they desired to stand on their demurrer and exceptions to defendants' answer as amended, whereupon judgment was rendered on July 18, 1891, in favor of the defendants in error, and to which judgment plaintiffs in error duly excepted. Afterwards, on February 12, 1892, this judgment was made final. This judgment, plaintiffs in error, by proper proceedings, seek now to have reviewed by this court.

The only issue, therefore, before this court is, we believe, whether or not the escheat proceedings, had in the district court

of Fayette county, are a bar to plaintiffs' action. The questions raised on this plea, reserved by the plaintiffs in error, are embraced in their assignments of error which are as follows:

ASSIGNMENTS OF ERROR.

First. That said Circuit Court erred in overruling plaintiffs' first amended second supplemental petition, filed July 6, 1891, which supplemental petition presented a general demurrer and special exceptions to the sufficiency of the defendants' supplemental answer, filed March 30, 1891, as fully appears by plaintiffs' bill of exceptions, approved and filed July 18, 1891, and a part of the record of this cause.

Second. The Circuit Court erred in holding that the escheat proceeding set out in defendants' first supplemental answer, wherein it was averred that the title to the land in controversy in this suit has been divested out of Walter Hamilton, under whom plaintiffs claim as heirs, barred these plaintiffs of any further interest in said lands, and especially that said escheat proceedings were sufficient to show an outstanding title against plaintiffs, so as to prevent their recovering in this action.

Third. The Circuit Court erred in not holding that the escheat proceedings and final judgment obtained therein, as set out in the defendants' first supplemental answer, were without the warrant and authority of any law in force in the State of Texas at the time said proceedings and judgment were had, the fact being that there was no law in Texas in force at the time by which real property could be escheated.

Fourth. The Circuit Court erred in not holding that the act of March 20, 1848, of the Legislature of the State of Texas, under which the escheat proceedings and judgment relied upon by defendants to bar plaintiffs' action, were begun and prosecuted, had not been repealed and annulled by the Constitution of the State of Texas, which went into effect in July, 1869, and especially in not holding that said act of March 20, 1848, was a nullity in this: that said law of 1848, Sec. 11, provides that the sheriff of the proper county shall seize and sell the real estate escheated to the State and sell the same in the manner therein provided; while the Constitution of 1869, Art. 4, Sec. 20, provides that the Comptroller of the State "shall take charge of all

escheated property, keep an accurate account of all moneys paid into the treasury, and of all the land escheated to the State," which provisions are contradictory and conflicting.

Fifth. Said Circuit Court erred in not holding that Section 11, of said act of March 20, 1848 (Pas. Dig., Art. 3667) which reads as follows: "A writ shall be issued to the sheriff of the proper county, commanding him to seize such estate vested in the State; and if the same be personal property, or real estate, he shall dispose thereof at public auction in the manner provided by law for the sale of property under execution," was by said Constitution of 1869, Art. 4, Sec. 20, which provides that the Comptroller of the State "shall take charge of all escheated property, keep an accurate account of all moneys paid into the treasury and all lands escheated to the State," repealed and annulled, and there being no other provision in said act by which compensation is made to the heirs of an intestate whose property has been escheated, the balance of said act is not self-acting and is one of confiscation, and therefore in violation of the fifth amendment to the Constitution of the United States and section 14 of the Bill of Rights of the Constitution of 1869 of the State of Texas.

Sixth. Said Circuit Court erred in holding that the act of March 20, 1848, under which said escheat proceedings and judgment relied on in said supplemental answer of defendants were not in contravention and violation of Section 10, and Art. 1, of the Constitution of the United States, which provides that "no State shall pass any law * * * * impairing the obligations of contracts," in this: that said law impairs the obligations of the contract between the State of Texas and Walter Hamilton and his heirs, by virtue of the grant under which they hold said land and seeks to forfeit or confiscate the private property of said Hamilton and his heirs by appropriating it to the common fund without making due compensation therefor * * * *

The foregoing assignments will be considered together, inasmuch as they involve the same matters. We now beg leave to call the attention of this court to the following propositions and argument in support of same:

ARGUMENT.

PROPOSITION FIRST:

At the time the judgment was rendered in the escheat proceedings relied on to defeat the title of plaintiffs in error, there was no law in force in the State of Texas authorizing the escheat of lands by proceedings in the district court of the county where the land was situated, and hence is the judgment absolutely void.

The law under which the proceedings, which eventuated in this judgment, putting the title of the land in the State, is sought to be maintained is as follows:

ESCHEAT.

Paschal's Annotated Digest of Laws of Texas, Fourth Edition.

An act provided for vesting in the State escheated property.

Art. 3657. (1.) If any person die seized of any real, or possessed of any personal estate, without any devisee thereof, and having no heirs; or where the owner of any real or personal estate shall be absent for the term of seven years, and is not known to exist, such estate shall escheat to and vest to the State.

Art. 3658. (2.) When the district attorney shall be informed, or have reason to believe an executor under the will has not accepted the trust and that no administrator with the will annexed has been appointed; and where said attorney shall discover that no letters of administration on the estate of an intestate, who has died without heirs, has been granted, he shall file a petition in behalf of the State, in the District Court of the county where such succession is required to be opened, according to the laws regulating the place of opening successions, which petition shall set forth a description of the estate, the name of the person last lawfully seized or possessed of the same, the names of the tenants or persons in actual possession, if any, and the names of persons claiming the estate, if any such are known to claim, and the facts and circumstances in consequence of which such estate is claimed to have escheated; praying for a writ of possession for the same, in behalf of the State.

Art. 3659. (3.) Such court shall award and issue *scire facias* against such person, bodies politic or corporate, as shall be alleged in such petition to hold possession or claim such estate, requiring them to appear and show cause why such estate shall not be vested in the State at the next term of the court.

Art. 3660. (4.) Such *scire facias* shall be served ten days before the return day thereof; and the court shall make an order setting forth briefly the contents of such petition, and requiring all persons interested in the estate to appear and show cause, at the next term of said court, why the same should not be vested in the State, which order shall be published four weeks in some newspaper printed in the State.

Art. 3661. (5.) All persons, bodies politic and bodies corporate, named in such petition as tenants or persons in actual possession, or claimants of the estate, may appear and plead to such proceedings, and may traverse the facts stated in the petition, or the title of the State to the lands and tenements therein mentioned, at any time on or before the third day after the return of the *scire facias;* and any other person claiming an interest in such estate may appear and be made a defendant, and plead by motion for that purpose in open court, within the time allowed for pleading.

Art. 3662. (6.) If no person, after a motion as aforesaid, shall appear and plead within the time prescribed by law, then judgment shall be rendered by default in behalf of the State.

Art. 3663. (7.) If any person appear and deny the title set up by the State, or traverse any material facts in the petition, issue shall be made up and tried as other issues of fact; and a survey may be ordered as in other cases where the titles or boundaries of lands are drawn in question.

Art. 3664. (8.) If after the issue and trial, it appears from the facts found or admitted, that the State hath good title to the estate, real or personal, in the petition mentioned or any part thereof, judgment shall be rendered, that the State shall be seized or possessed thereof, and at the discretion of the court, recover costs against the defendants.

Art. 3665. (9.) If it appear that the State hath no title in such estate, the defendant shall recover his costs, to be taxed and certified by the clerk; and the Comptroller of Public Accounts shall, on such certificate being filed in his office, issue a warrant therefor on the treasury of the State, which shall be paid as other demands on the treasury.

Art. 3666. (10.) When any judgment shall be rendered, that the State be seized or possessed of any estate, such judg-

ment shall contain a description thereof, and shall vest the title in the State.

Art. 3667. (11.) A writ shall be issued to the sheriff of the proper county, commanding him to seize such estate, vested in the State; and if the same be personal property, or real estate, he shall dispose thereof at public auction, in the manner provided by law for the sale of property under execution.

Art. 3668. (12.) The district attorney for the district shall cause two copies of the record and account of sale to be exemplified under the seal of the court, and shall cause one of the same to be deposited in the office of the Comptroller of Public Accounts and the other to be recorded in the office of the recorder of the county in which the property was sold; and such record shall preclude all parties and privies thereto, their heirs and assigns.

Art. 3669. (13.) Any party who shall have appeared to any proceeding, and the district attorney, on behalf of the State, shall have the right to prosecute an appeal or writ of error upon such judgment.

Art. 3670. (14.) The Comptroller shall keep just accounts of all moneys paid into the treasury and of lands vested in the State under the provisions of this act.

The foregoing law is based on the Constitution of Texas of 1845, in force at the time it was enacted. Art. 13, Sec. 4, of that Constitution providing that "all fines * * * and escheats which shall have accrued to the Republic of Texas under the Constitution and laws shall accrue to the State of Texas, and the Legislature shall by law provide a method for determining what lands have been forfeited or escheated." Of course, this provision of the Constitution is permissive only and without an act of the Legislature to that end no lands could have been forfeited or escheated. (Hancock v. McKinnly, 7 Texas, 445; Swift v. Herrera, 9 Texas, 280; Jones v. McMasters, 20 How., U. S., 21.) In pursuance of this permit of the Constitution this act was passed.

A discussion of the inconsistencies and contradictions of this law itself would be highly interesting. However, as that feature of the law is immaterial to the present proposition, we will content ourselves by referring to the consideration of the same as found in the printed argument of counsel for appellant, and

in the opinion of the court in the case of Hughes v. The State, 41 Texas, 11.

Art. 4, Sec. 10, of the Constitution of 1848, confers jurisdiction on the District Court on all matters relating to escheat. The Constitution of 1861 contains a provision identical to that of Art. 13, Sec. 4, of the Constitution of 1845, above quoted. The Constitution of 1866, while giving jurisdiction, like the Constitutions of 1845 and 1861 to the District Court of action of escheat makes no further mention of the subject. It will be unnecessary, however, to consider the Constitutions of 1861 and 1866, as at the time decree vesting title in the State to the Hamilton league, these Constitutions were no longer in force, having been superceded by that of 1869. In this last Constitution, we find the following provisions with reference to escheat, and these alone:

Art. 4, Sec. 20. "There shall be a Comptroller of Public Accounts. * * * * * He shall take charge of all escheated property, keep an accurate account of all moneys paid into the treasury and of all lands escheated to the State."

Art. 5, Sec. 7. "The District Court shall have original jurisdiction * * * * * of all causes in behalf of the State to recover * * * * * escheats."

Art. 10, Sec. 6. "The Legislature shall not hereafter grant lands to any person or persons, nor shall any certificates for land be sold at the land office except to actual settlers upon same and in lots not exceeding 160 acres."

This last section was subsequently amended so as to permit the granting of lands by the State for internal improvements.

From the foregoing excerpts from the organic law, it will be seen that at the time of the so-called divestiture of title "out of Hamilton and his heirs," and into the State of Texas, a portion only of the Constitution of 1845 was carried into that of 1869; *the power of the Legislature to provide the means by which land could be escheated was dropped.* This change in the organic law would not of itself, however, have deprived the Legislature of the power to enact a law of escheat for, except as curtailed by the Constitution, that body is of unlimited power. (Cooley on Constitutional Limitations, p. 89, citing Thorpe v. Ry. Co., 27 Vt., 142, and numerous other cases.)

The Constitution of 1869 did not, however, stop here, but in

no uncertain terms vested the title of escheated land in the State, and gave the Comptroller the custody of such lands. Article 10, section 6, above quoted, in positive language prohibits the sale of lands, except for internal improvements and to actual settlers; under neither exception came the provisions of the escheat law. We then have vestiture of title to escheated land in the State and positive inhibition against the power of the Legislature to divest that title. It seems to us, therefore, that we must conclude that the Constitution of 1869 repealed the law of 1848, and hence, at the time the judgment plead was rendered it was without law. The Constitution of 1869 forbade such a proceeding; it forbade the sheriff from selling the land, or from having anything to do with it in any manner. The sheriff's sale was a nullity to the same effect as if he were acting under a dead execution, his act was *functus officio* (Hooper v. Caruthers, 78 Texas, 432), and certainly no title passed.

That the law of 1848 was not in force, is held by Judge Moore in the case of Hughes v. State, 41 Texas, 18. The opinion in that case, after discussing the law of tenure in Texas, and tracing the law of escheat in Texas down to the rendition of that opinion in 1874, says:

"In fulfillment of the duty imposed upon the Legislature by the provision of the Constitution of 1845, which we have quoted above, the law of March 20, 1848, entitled 'An act to provide for vesting in the State escheated property was enacted.' And it is under the authority supposed to have been conferred by it, no doubt this suit was instituted and conducted. But whether this statute had not been repealed by the provision of the Constitution of 1869, which we have cited may, we think, admit of serious question, but as it is not necessary to the determination of the present case, we are not called upon at present to determine it. We think, however, that it is quite evident this section of the Constitution is in conflict with, and therefore revokes the authority conferred by the statute of 1848, upon the court to order the sale of the escheated land, if such indeed can be held to be the proper construction of this statute, in view of the conflicting provisions of its sections, and for this reason, if for no other, the judgment in this case should be reversed."

On the same subject, the commissioners, who revised the present Civil Statutes of Texas, in their report, remark:

"Our Supreme Court has intimated that the escheat act of March 20, 1848, was probably repealed by the Constitution of 1869." (See Report, 2nd Vol. of Sayles Edition of Statutes, p. 725.)

Nor does the fact that the suit was brought as early as 1861, when the law of March, 1848, if ever constitutional, was in force in anywise aid the defendants in error.

Judge Cooley says:

"The bringing of suit vests in a party no right to a particular decision; and his case must be determined on the law as it stands, not when the suit was brought, but when the judgment was rendered." (Cooley's Constitutional Limitations, p. 381 citing Watson v. Mercer, 8 Pet., U. S., 88, and other cases.)

Hence we claim that this court should sustain our contention and hold that the so-called judgment presents no defense to the action of the plaintiffs in error.

PROPOSITION TWO:

The adoption of the Constitution of 1869 repeals all laws in conflict therewith.

PROPOSITION THREE:

Every Constitution or statute is by implication a repeal of all prior statutes repugnant thereto.

These propositions are but corollary to the first proposition, and no doubt need no argument at our hands. However, for the convenience of the court, we will quote the language of some of the most pointed authorities.

Cass v. Dillon, 2 Ohio State, 670: This case involved the right of a county to subscribe to the stock of a railway company. It was contended that the new Constitution of Ohio forbade it. The court in that case, by Judge Thurman, says:

"All laws in force when the new Constitution went into effect, and which are not inconsistent with it, would have remained in force, and all inconsistent laws fell simply because they were inconsistent, in other words, all repugnant laws were repealed by implication. * * * * * * The old Constitution was abrogated when the present took effect, and with it fell every particle of legislation inconsistent with the grants of power contained in that which took its place. In other words, what can-

not now be done by the government by virtue of its own inherent power and under its own legislation, cannot continue to be done under the authority of legislation enacted under the former Constitution."

Pierce v. Delameter, 1 Comst., N. Y., 18: This case involved the right of a judge to take part as a member of the Superior Court in the affirmance or reversal of his own judgment. R. S., art. 275, of New York, provided "that no judge of any appellate court shall decide or take part in any cause which shall have been determined by him when sitting as a judge of any other court." Says the Court of Appeals of New York: "The Constitution of 1821 (under which this act was passed) has been abrogated, and the only question is whether this statute has not been virtually repealed. I think it has. The Constitution of 1846 confers the same powers upon all judges of the Court of Appeals and justices of the Supreme Court, with the single exception that no judicial officer can exercise his office while under impeachment. This statute comes in conflict with the fundamental law of the land, and must of necessity be overthrown." In Rogers v. Watrous, 8 Texas, 65, Judge Wheeler, for the court, says: "The provisions of the Constitution, which we have cited, evidently contemplates a revision by the Legislature of the law upon the subject of the change of venue. * * * * * * The law does not favor repeals by implication. But a subsequent statute revising the subject matter of a former one, and evidently intended as a substitute for it, although it contained no express words to that effect, must operate to repeal the former to the extent to which its provisions are revised and supplied." Likewise in Hanrick v. Hanrick, 61 Texas, 601. The doctrine seems to be well settled that "when a statute comprehends the entire subject and creates a new and independent system respecting the subject matter, it repeals all previous systems and laws restricting the same subject."

"The adoption of a new Constitution repeals all laws in conflict therewith." (Sedgwick on Construction of Statutes, p. 490. See also pp. 104, 107, 125.) The following Texas cases also uphold this view:

Bryan v. Sundberg, 5 Texas, 733.

State v. Horan, 11 Texas, 144.

Cain v. State, 20 Texas, 355.

Ex parte Velasquez, 26 Texas, 178.
Tunstall v. Wormley, 54 Texas, 480.

PROPOSITION FOUR:

The escheat act of March, 1848, was wholly repealed by Art. 4, Sec. 20, of the Constitution of 1869, for to hold otherwise in effect makes that act one of Confiscation and forfeiture, as it deprives the citizen of property without compensating him therefor.

There can be no question that according to case of Hughes v. State, 41 Texas, 10, that portion of the act of March 20, 1848, which authorizes the sheriff to sell the land was repealed. Judge Moore so expressly decides, when he says "this section of the Constitution *is in conflict with* and *therefore revokes the authority conferred by the statute of 1848 upon the court to order the sale of the escheated land*," and this decision we know, under the well known rule recognized by the federal courts, your honors will not hesitate to follow. The effect of this is to leave a vestiture of title in the State. In other words, while the defendants in error are without title, there is an outstanding title *apparently* in the State. We say *apparently*, for a careful investigation will convince the court that such is not the fact. To hold so is to violate the fundamental principles of both the State and Federal Constitutions and deprive parties of property without compensation, and no suitor is justly so much favored by the courts, and especially the federal courts, as one who righteously urges this plea. Consider for a moment. Here is a law, a portion of which, that sought to compensate the owner for his property, repealed by a subsequent law, the organic law of the land. There remains of the act so emasculated by the Constitution of 1869, only that portion which vests title in the State of the land of the citizen, without giving him any compensation therefor, or providing in any way for the true owner to come and claim his property or obtain its value. Is not such law confiscatory? Ought we not to presume that the legislators who enacted the law of March, 1848, were imbued with proper motives, and that their views as to what the true owner was entitled, if any such ever appeared, were embraced in those sections of the law repealed by the Constitution of 1869, which provided ways and means for the true owner to assert his rights and claim at least the value of his property sold by the

sheriff? To this conclusion we are forced, and hence must we conclude that the repeal by the Constitution of 1869 of authority conferred by the statute of 1848, upon the district court to order the escheated land sold of its force, renders the balance of the law without a purpose, not self-executing and confiscatory. "To hold otherwise, would be to substitute for the law intended by the Legislature, one they may never have been willing by itself to enact." (Quoting from Judge Matthews' opinion in the Virginia Coupon Cases, 114 U. S., p. 305.)

This view is abundantly sustained by authority.

In Allen v. Louisiana, 103 U. S., 83, the rule is thus stated:

"It is an elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand, while that which is unconstitutional will be rejected." "But," as was said by Chief Justice Shaw, in Warren v. Mayor and Aldermen of Charleston (2 Gray, Mass., 84), "if they are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant a belief that the Legislature intended them as a whole, and that if all could be carried into effect the Legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them. The point to be determined in all such cases is, whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the Legislature."

To the same effect are:

Ex parte Towles, 48 Texas, 426.

Zwernemann v. Von Rosenberg, 76 Texas, 527.

Cooley on Const. Limitations, p. 178.

Slauson v. Racine, 13 Wis., 398.

Virginia Coupon Cases, 114 U. S., 304.

Huntington v. Worthen, 120 U. S., 97.

Field v. Clark, 143 U. S., 649.

The act of March, 1848, as we have already shown, was passed, not in pursuance of any express power, but by permission of the Constitution of 1845. The Constitution of 1869 expressly forbids the Legislature from granting lands to any one except for

certain purposes. The judgment at bar relates to neither of the exceptions. Thus the general power permitted to be exercised by the Legislature has been revoked. The revocation inhibited all power over the subject which the Legislature had remitted to sub-agents. (Story on Agency, Sec. 649.) As was well said by counsel in arguing this very proposition in the Hughes case: "When the Constitution on this point was changed all legislation which had been based on this constitutional permission became lifeless. Its source of power was dried up. The principle has fallen to the ground, and all depending legislation which, like vines, had grown up and drew their vitality from it, must likewise fall prostrate and be known in our judicial records no longer."

As Judge Moore intimates in the Hughes case the facts alleged in the plea might be a ground for the forfeiture of the property to the State, but we must bear in mind that the act of March, 1848, relates to escheat alone, and that at no time has the Legislature seen fit to provide a method for determining the forfeiture of land.

PROPOSITION FIVE:

The title to the land in controversy having vested in the heirs of Walter Hamilton at the time of his death, no escheat proceedings would lie against the land, because under the terms of the Statute, it is limited to those cases where there are no heirs.

In other words, our contention is that, even if the law was in force at the time the judgment was rendered, that under the averments in the plea of defendants, no title passed to any one by the judgment in the Fayette county case. This plea says "that Walter Hamilton was the last person seized and possessed of the land; that he is dead, no one is in actual or constructive possession of the land, nor is any one so far as known to petitioner claiming any interest therein." From these averments it follows that at the death of Hamilton, he having the title to the land, that it vested in his heirs if any he had.

The language of the law is as follows: "If any person die seized of any real estate, or possessed of any personal estate, without any devise thereof, and having no heirs, or when the owner of any real estate or personal estate shall be absent for

the term of seven years, and is not known to exist, *such* estate shall escheat to and vest in the State." (Pasc. Dig., Art. 3957.)

The next article empowers the district attorney to file suit, "when he is informed or has reason to believe" that "no succession * * * * * has been opened on the estate of an intestate *who has died without heirs.*"

It is apparent that the terms and conditions of the law limit its application to those cases where an intestate *dies without heirs.*

The judgment and records relied upon by the defendants in this case, to establish an outstanding title in the State, show beyond question, that an effort was made under color of escheat to divest the title of the heirs. The judgment reads: "And the title of Walter Hamilton and *his heirs* is hereby *divested* and vested in the State of Texas."

But we are not forced to rely upon a logical construction or first impression of the statute. This very statute was thoroughly analyzed by Judge Moore, in the case of Hughes v. State, 41 Texas, 19. In discussing this statute to determine whether a petition was sufficient when there was no positive averment that the intestate left no heirs he used this language:

"We are of the opinion, however, that the petition is altogether insufficient to authorize an escheat of the property described in it under the provisions of the statute under which the suit is brought, if it is still in force. The first section of the statute reads: 'If any person die seized of any real or possessed of any personal estate, without any devise thereof, and having no heirs; or where the owner of any real or personal estate shall be absent for the term of seven years, and is not known to exist, such estate shall escheat to and vest in the State.' The essential facts upon which title by escheat should vest in the State are set forth in this section. These, as expressed in the first clause in the section, are distinctly stated to be death of the owner without a devise, *and having no heirs—that is, where there is no one in being who can, on the death of the owner, claim or hold under a will or the laws of the State regulating descent and distribution of estates of intestates.* Evidently, it was not the purpose of the Legislature, if it had been competent for it to do so, to confer upon the State title to property, under color of a proceeding to escheat it, to which it was not entitled under its sovereignty as the original and ultimate proprietor of all the lands within its jurisdiction.

It may be said that the second clause escheats the property of all persons who are absent for the term of seven years, and are not known to exist. To vest title in the State simply by reason of the absence of the owner for any particular length of time, whether known to exist or not, *might be a forfeiture* of the property, but it *certainly would not be to escheat it.* The section is very inartificially drawn, but manifestly it was not intended by this clause to vest in the State property to which it could claim no title under and by virtue of the well known character of right for which this statute, in its title, declares it is enacted to provide by reason of other facts which, at most, are merely presumptive evidence of the existence of one of the essential elements in such a title. Obviously, the purpose and import of this clause is that proof of absence of one who is not known to exist for the length of time mentioned is presumptive evidence of his death. It is not, therefore a ground for escheat of itself, but evidence of one of the elements of title by escheat.

"The second section of the statute declares and points out the occasion when it becomes the duty of the district attorney to institute proceedings to vest in the State property to which it may be entitled, and it also sets forth the essential averments which the petition he is required to file shall contain, among which are the facts and circumstances in consequence of which such estates claimed to have escheated. And this petition must be filed in the district court of the county in which succession of the estate of the decedent is required to be opened. It follows, therefore, the petition is insufficient, unless it appears, *prima facie*, at least, that it is filed in the county entitled to administration upon the estate, and it must, with other matters to be stated, distinctly allege the death of the party whose estate is to be escheated, and that he died *without any devisee* thereof *and having no heirs.*"

This article of the escheat law, in its very language, is carried into our Revised Statutes and is construed in Weideranders v. State, 64 Texas, 141, by Chief Justice Stayton. After discussing the law to determine whether under the laws of Texas an alien heir could inherit from a citizen of Texas dying intestate, he says:

"We have referred to these matters for the purpose of ascertaining the true state of the title to the lands mentioned, the true

relation of the State thereto and the methods necessary to be pursued by the State to assert whatever right it may have.

"It is then evident, if the facts stated by those who claim to be the heirs of Donald Smith be true, that he did not die 'having no heirs.'

"This being true, it follows that the provisions of the Revised Statutes (arts. 1770–1785) have no application whatever to the facts of this case; *for they only authorize proceedings in cases in which persons having estates have died having no heirs*—have application only to cases of escheat proper.

"The conditions under which alien heirs take not being conditions precedent, and the provisions of the statute not operating as a limitation on the estate of the alien heirs, *ipso facto*, divesting an estate formerly vested in such person by the expiration of the period of limitation, the State cannot maintain this action, as might it or an individual clothed with title; for the title at the death of Donald Smith vested in whomsoever may have sustained such relation to him as to be deemed in law his heir.

"If the averment of those who claim to be the heirs of Donald Smith be true, then the case is this: '*the title to the land vested in them at the time of the death of their ancestor*' and the State now has simply the right, if the heirs have not complied with the conditions imposed by law, to have the estate forfeited for such failure, unless said right has been affected by treaty or the act of February, 1854 (R. S., art. 9), and by legislation of the country of which such heirs are citizens, responsive to that act, of which we need not now inquire. No officer of this State, however, has the right to institute a proceeding to have such a forfeiture declared, nor has any court within the State the jurisdiction to declare such a forfeiture, until the State, through the Legislature, has declared the will of the State to enforce its right to have the forfeiture declared, and has provided the method by which this shall be done.

"The Constitution itself contemplates that the Legislature shall act and shall put in motion and provide rules for the exercise of this right.

"It provides that 'the Legislature shall provide a method for determining what lands have been forfeited, and for giving effect to escheats.'

"The act under which this action was instituted neither de-

clares the will of the State to enforce the forfeiture, nor provides a method by which it shall be done, but applies solely to cases where persons have *died, or are presumed to have died, having no heirs.* The one is simply a declaration by a decree of court that no one lived who could inherit from the deceased, *and takes away no right in any one which existed before the decree;* but the effect of a decree of forfeiture, upon the ground that alien heirs have not complied with conditions provided by law, is to divest a right which, but for the decree, would have continued in the alien heir, notwithstanding the existence of the facts which would authorize a forfeiture."

By the construction given the statute by our highest courts then it is clear when heirs exist, no escheat can be had. It makes no difference that a judgment has been rendered escheating the land because, as Judge Stayton says, "the judgment takes away no right in any one which existed before the decree." Nor can it be argued that it is *res adjudicata*, for if it be contended that the heirs were parties to the suit, under the decisions, the judgment is void; and if they were not parties they were not bound by it.

There are but few cases relating to escheat in the Texas Reports besides those from which we have already quoted so copiously. (State v. Tuelon, 41 Texas, 249, State v. Wygall, 51 Texas, 621; Horton v. Brown, 2 Texas, 78; Hill v. Claiborne, 27 Texas, 217; Hanna v. State, 84 Texas, 664; Ellis v. State, 21 S. W. Rep., 724.)

It is interesting to note the strictness with which the Supreme Court of Texas construes all questions arising in these cases, and the reluctance with which they affirm, even in the absence of assigned errors.

Hence, again, must this court conclude that the judgment set up by defendants is a nullity, and cannot therefore be the basis of any right, and is subject to be collaterally attacked. (Freeman on Judgments, Secs. 564-66; Pennoyer v. Neff, 96 U. S., 714; Hart v. Sanson, 110 U. S., 151; Freeman v. Alderson, 119 U. S., 185; St. Clair v. Cox, 106 U. S., 350; Ry. Co. v. Punkney, 149 U. S., 194; Nelson v. Seligman, 36 Fed. Rep., 154; Ib., 144 U. S., 41; and amongst others the following Texas cases: Scott v. Streeley, 73 Tex., 547; Martin v. Cobb, 77 Tex., 546; Martin v. Burns, 80 Tex., 699.

PROPOSITION SIX:

Even though the escheat law should be held to apply to the case at bar, the law is further unconstitutional, because it seeks to divest the title vested in the heirs of Walter Hamilton by virtue of the Spanish grant, and thus to impair the obligations of that grant, which is expressly forbidden by the Constitution of the United States, Sec. 10, Art. 2.

From the Dartmouth College case, in 4 Wheaton, and even before that time and down to the present time, the United States Supreme Court, and likewise other tribunals, have so often discussed questions arising under this article and section of the Constitution, that it is unnecessary for us to consider this proposition at length, though by so doing, we in no wise wish to be considered as having lost faith in it, or in any manner waiving it. It is sound, and well supported by authority. That a grant to land is a contract within the meaning of the Constitution, and cannot be revoked at the will of the Legislature, the following cases (more particularly in point) amongst others decide:

Fletcher v. Peck, 9 Cranch, 160.
Montgomery v. Coe, 16 Cal., 189.
Gray v. Davis, 1 Woods (U. S. Cir. Ct.), 421; 16 Wallace, 205.
Reaper v. Pratt, 17 Johns (N. Y.), 195.
Rehoboth v. Hunt, 1 Pick. (Mass.), 224.
Lowry v. Miller, 2 Yer. (Tenn.), 534.
State v. Barker, 4 Kan., 379.

In conclusion, let us briefly consider the judgment and the suit on which it is based. This judgment is as follows:

No. 1663.
THE STATE OF TEXAS
vs.
WALTER HAMILTON.
} ESCHEAT:

Heretofore, to-wit: on the day of July, 1871, this cause came on to be heard, when the plaintiff appeared by attorney and announced ready for trial. The defendants failed to appear, but made default, and the intervenors, J. G. Brown, J. J. Short, Wm. Short an — — Short, appeared by attorneys and announced ready for trial. Thereupon came a jury of good and lawful men, viz: G. J. Penn and eleven others who, having heard the

evidence, argument of counsel, and charge of the court, retired to consider their verdict, and returned the following, to-wit:

"We, the jury, find in favor of plaintiff.

"G. J. PENN,

"Foreman."

It is thereupon ordered, adjudged and decreed by the court that the league of land described and set forth in plaintiffs' petition, as follows: * * * be and the same is hereby escheated to the State of Texas, and the title thereto is hereby divested out of the said Walter Hamilton, his heirs and assigns forever, and vested in the State of Texas. It is further ordered by the court that the clerk of this court issue a writ directed to the sheriff of Fayette county, Texas, commanding him, the said sheriff, to seize and sell the above described league of land as under execution, without appraisement, for cash in United States currency, on the first Tuesday in some month, after giving notice of sale as the law directs, in lots of not less than ten nor more than forty acres, and turn over the proceeds of said sale, after deducting therefrom the costs and expenses of the same, to the Comptroller of Public Accounts of the State of Texas, taking therefor his duplicate receipt, one of which he shall file among the papers of this cause. It is further ordered by the court that the plaintiff, the State of Texas, do have and recover of the intervenors herein, to-wit: J. G. Brown, J. J. Short, Wm. Short, — — Short her costs of suit in this behalf had and expended for which execution may issue. It is further ordered that the costs incurred herein by the plaintiff be taxed against the State of Texas and certified by the clerk of this court to the Comptroller of Public Accounts to be paid by the Treasurer upon the warrant of said Comptroller.

The case of Brown v. State, 36 Texas, 282, was an appeal from this judgment. The court will, however, find upon an examination of that case, that the appeal was on the part of Brown, one of the intervenors, and does not involve the questions here raised. Hence in no sense can this judgment affect these plaintiffs in error, who bring this action as the heirs of Walter Hamilton.

Examine this judgment carefully. You will notice that no date of judgment is given. The name of no person as a defendant is given anywhere in this judgment. There is no recital that any legal service was ever had upon any person as a defendant.

Right here in passing, we desire briefly to call the attention of this court to the fact that there is no sufficient averment anywhere in the plea that legal process has been had on any defendant. Surely in the light of the decisions of York v. Texas in 73 Texas, 651; Anderson v. Stewart in 70 Texas, 588, and the numerous Texas cases since these were decided, down to the late reported case of Martin v. Burns, 80 Texas, 670, this court will not be warranted in holding that such notice as a publication in the "New Era" is sufficient to bind any defendant. Further discussion of this phase of the plea, supported as it is by the numerous decisions, both State and Federal, already cited, and especially by Alabama Ins. Co. v. Parrott, 4 Woods, 355. St. Clair v. Cox, 106 U. S., 350, is unnecessary. Hence we conclude that the general demurrer to the plea should have been sustained. In reality the Fayette county suit is only a controversy between the State and the intervenors, Brown and others, and is conclusive only of their rights. The affirmance of the judgment by the Supreme Court gave no sanctity or validity to the judgment so far as the rights of these plaintiffs or other parties not privy to the intervenors are concerned. This proposition is elementary and axiomatic.

Sweatman v. Stratton, 74 Texas, 78.

Timmons v. Bonner, 58 Texas, 561.

Cowan v. Nixon, 28 Texas, 231.

Chambers v. Hodges, 23 Texas, 104.

Horan v. Wahrenberger, 9 Texas, 313.

To recapitulate briefly we insist that the Circuit Court should have sustained our demurrer and exceptions and stricken out defendants' plea and held the judgment therein set out was not a bar to plaintiffs' action, because:

1. The act of March, 1848, which authorized the escheat proceedings eventuating in that judgment had been repealed by the constitution of 1869.

2. That if not wholly repealed under the Hughes case, 41 Texas, the very marrow of the act of March, 1848, had been so repealed, thus leaving the remainder inoperative, not self-acting and confiscatory, and hence unconstitutional.

3. That the judgment in no sense could deprive the defendants of the land, because on the death of Walter Hamilton, the land became vested in his heirs, and under this state of facts

and under the rule laid down in the Hughes case, 41 Texas, and Weideranders case in 64 Texas, the statute of March, 1848, is limited to those cases where there are no heirs.

4. That the grant to Hamilton by the Mexican government being a contract, the law of March, 1848, even if unrepealed and constitutional, would impair and nullify the rights of Hamilton and parties claiming under, and therefore violative of Art. 2, Sec. 10, of the United States.

5. That this judgment is a nullity based upon no process of law.

This court, therefore, we believe ought to and will conclude that the Circuit Court below erred in overruling the demurrer and special exceptions of plaintiffs in error to defendants' plea of estoppel, and inasmuch as it was the ruling of the court on this plea that occasioned a judgment for defendants, this court should reverse the judgment and remand the cause with directions to the Circuit Court to sustain the general demurrer and special exceptions of plaintiffs in error and let the cause proceed to trial, and this we ask this honorable court now to do.

H. E BARNARD,
FLOYD McGOWN,
WEST & COCHRAN,

Attorneys for Plaintiffs in Error, Jos. F. Hamilton and Others.

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No. ~~538.~~ 241

Supreme Court of the United States.

OCTOBER TERM, 1894.

JOS. F. HAMILTON ET AL., PLAINTIFFS IN ERROR,

vs.

J. G. BROWN ET AL., DEFENDANTS IN ERROR.

In Error to the United States Circuit Court for the Western District of Texas.

BRIEF AND ARGUMENT IN BEHALF OF J. G. BROWN AND OTHERS, DEFENDANTS IN ERROR, FOR SUBMISSION UNDER RULE 20 OF THIS COURT.

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Defendants in Error accept the *statement of the case* as presented in the brief of Plaintiffs in Error.

ARGUMENT.

FIRST PROPOSITION COUNTER TO FIRST, SECOND AND THIRD PROPOSITIONS OF PLAINTIFFS IN ERROR:

At the time the judgment was rendered in the escheat proceedings relied on by defendants in error, the act of 1848, at least in so far as it authorized the escheat of lands and the vesting of title to same in the State, was in full force in the State of Texas, and was not repealed by, or repugnant to, the Constitution of 1869.

The escheat act of 1848, which Plaintiffs in Error claim is repugnant to, and was repealed by, the Constitution of 1869, is as follows:

ESCHEAT.

Paschal's Annotated Digest of Laws of Texas, Fourth Edition.

An act to provide for vesting in the State escheated property.

Art. 3657. (1.) If any person die seized of any real, or possessed of any personal estate, without any devisee thereof, and having no heirs; or where the owner of any real or personal estate shall be absent for the term of seven years, and is not known to exist, such estate shall escheat to and vest to the State.

Art. 3658. (2.) When the district attorney shall be informed, or have reason to believe an executor under the will has not accepted the trust and that no administrator with the will annexed has been appointed; and where said attorney shall discover that no letters of administration on the estate of an intestate, who has died without heirs, has been granted, he shall file a petition in behalf of the State, in the District Court of the county where such succession is required to be opened, according to the laws regulating the place of opening successions, which petition shall set forth a description of the estate, the name of the person last lawfully seized or possessed of the same, the names of the tenants or persons in actual possession, if any, and the names of persons claiming the estate, if any such are known to claim, and the facts and circumstances in consequence of which such estate is claimed to have escheated; praying for a writ of possession for the same, in behalf of the State.

Art. 3659. (3.) Such court shall award and issue *scire facias* against such person, bodies politic or corporate, as shall be alleged in such petition to hold possession or claim such estate, requiring them to appear and show cause why such estate shall not be vested in the State at the next term of the court.

Art. 3660. (4.) Such *scire facias* shall be served ten days before the return day thereof; and the court shall make an order setting forth briefly the contents of such petition, and requiring all persons interested in the estate to appear and show cause, at the next term of said court, why the same should not be vested in the State, which order shall be published four weeks in some newspaper printed in the State.

Art. 3661. (5.) All persons, bodies politic and bodies corporate, named in such petition as tenants or persons in actual possession, or claimants of the estate, may appear and plead to such proceedings, and may traverse the facts stated in the petition, or the title of the State to the lands and tenements therein mentioned, at any time on or before the third day after the return of the *scire facias;* and any other person claiming an interest in such

estate may appear and be made a defendant, and plead by motion for that purpose in open court, within the time allowed for pleading.

Art. 3662. (6.) If no person, after a motion as aforesaid, shall appear and plead within the time prescribed by law, then judgment shall be rendered by default in behalf of the State.

Art. 3663. (7.) If any person appear and deny the title set up by the State, or traverse any material facts in the petition, issue shall be made up and tried as other issues of fact; and a survey may be ordered as in other cases where the titles or boundaries of lands are drawn in question.

Art. 3664. (8.) If after the issue and trial, it appears from the facts found or admitted, that the State hath good title to the estate, real or personal, in the petition mentioned or any part thereof, judgment shall be rendered, that the State shall be seized or possessed thereof, and at the discretion of the court, recover costs against the defendants.

Art. 3665. (9.) If it appear that the State hath no title in such estate, the defendant shall recover his costs, to be taxed and certified by the clerk; and the Comptroller of Public Accounts shall, on such certificate being filed in his office, issue a warrant therefor on the treasury of the State, which shall be paid as other demands on the treasury.

Art. 3666. (10.) When any judgment shall be rendered, that the State be seized or possessed of any estate, such judgment shall contain a description thereof, and shall vest the title in the State.

Art. 3667. (11.) A writ shall be issued to the sheriff of the proper county, commanding him to seize such estate, vested in the State; and if the same be personal property, or real estate, he shall dispose thereof at public auction, in the manner provided by law for the sale of property under execution.

Art. 3668. (12.) The district attorney for the district shall cause two copies of the record and account of sale to be exemplified under the seal of the court, and shall cause one of the same to be deposited in the office of the Comptroller of Public Accounts and the other to be recorded in the office of the recorder of the county in which the property was sold; and such record

shall preclude all parties and privies thereto, their heirs and assigns.

Art. 3669. (13.) Any party who shall have appeared to any proceeding, and the district attorney, on behalf of the State, shall have the right to prosecute an appeal or writ of error upon such judgment.

Art. 3670. (14.) The Comptroller shall keep just accounts of all moneys paid into the treasury and of lands vested in the State under the provisions of this act.

The portions of the Constitution of 1869 bearing on the subject are as follows:

Art. 4, Sec. 20. There shall be a Comptroller of Public Accounts. * * * * * He shall take charge of all escheated property, keep an accurate account of all moneys paid into the treasury and of all lands escheated to the State.

Art. 4, Sec. 7. The District Court shall have original jurisdiction * * * * * of all causes in behalf of the State to recover penalties, forfeitures and escheats.

While the proposition of Plaintiffs in Error—that every constitution or statute is by implication a repeal of all prior statutes repugnant thereto—is correct, the converse proposition—that *no* constitution or statute is by implication a repeal of prior statutes *not* repugnant thereto—is equally correct, and in this case, according to our view, much more applicable.

Conceding that section 11 of the escheat act of 1848 was in conflict with the Constitution of 1869 (art. 4, sec. 20), and that the power of the District Court to order the sale of escheated property had thus been revoked, the question is: Had the District Court power by escheat proceedings to vest in the State of Texas title to the Walter Hamilton league of land?

It is a well settled principle of law that an entire act will not necessarily fall to the ground as unconstitutional because one section of the act may be in conflict with the Constitution. (Cooley's Const. Lim., 215.) We accept the language of the Supreme Court of the United States in the case of Allen v. Louisiana, 103 U. S. (quoted in brief of Plaintiff in Error, p. 15), as laying down the correct rule:

"It is an elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that if the

parts are wholly independent of each other, that which is constitutional may stand, while that which is unconstitutional will be rejected." "But," as was said by Chief Justice Shaw, in Warren v. Mayor and Aldermen of Charleston (2 Gray, Mass., 84), "if they are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant a belief that the Legislature intended them as a whole, and that if all could be carried into effect the Legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them. The point to be determined in all such cases is, whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the Legislature."

What, then, was the intent of the Legislature in passing the act of 1848?

That act was passed in obedience to article 13, section 4, of the Constitution of 1845, as follows;

"All fines * * * and escheats which shall have accrued to the Republic of Texas under the Constitution and laws shall accrue to the State of Texas, and the Legislature shall by law provide a method of determining what lands have been forfeited or escheated." It is not disputed that the law was constitutional when passed.

The caption of the act was as follows: "*An act providing for vesting in the State escheated property.*"

Of the fourteen sections constituting the act, the first ten and the last three are devoted to prescribing how the title to escheated property should be vested in the State and the effect; the eleventh section provides what disposition shall be made of escheated property, *after it* has been vested in the State, and is as follows:

"(11) A writ shall be issued to the sheriff of the proper county, commanding him to seize such estate vested in the State; and if the same be personal property, or real estate, he shall dispose thereof at public auction in the manner provided by law for the sale of property under execution."

We submit that section 11 is merely an incident of the escheat provided for by the act of 1848; that it is not so connected with the general scope of the law ("an act providing for vesting in the

State escheated property") as to make it impossible, if it was stricken out, to give effect to what appears to have been the *intent* of the Legislature, viz.: to provide a statutory method of judicially determining what land had escheated to the State; and that, after striking out the portion of the act providing for the sale of property which had been escheated, there would be left a complete system, perfect in itself, and in full harmony with the provisions on the subject of escheat contained in the Constitution of 1869.

Plaintiffs in Error base their position, almost solely, upon the case of Hughes v. The State of Texas, 41 Texas, 10, and the suggestion thrown out by Judge Moore in that case to the effect that the Constitution of 1869 might have repealed the act of 1848. The only language used in that opinion which bears on the point is as follows:

"Whether this statute (of 1848) had not been repealed by the provision in the Constitution of 1869 (art. 4, sec. 20), which we have cited, may, we think, admit of serious question; but as it is not necessary to the determination of the present case, we are not called upon at present to determine it. We think, however, that it is quite evident this section of the Constitution is in conflict with, and therefore revokes, the authority conferred by the statute of 1848 upon the court to order the *sale* of escheated land," etc. (p. 18, 19). It is unnecessary to discuss what weight is to be given to the words of the learned judge—when he steps aside to suggest what *might be* a serious question, but one which he did not feel called upon to determine and did *not* determine—further than to say that he appears to have represented the Texas court of last *conjecture*.

Further than the above, there has been no "intimation (by the Supreme Court of Texas) that the escheat act of March 20, 1840, was probably repealed by the Constitution of 1869" (as quoted from Sayles' edition of Statutes, on page 12 of brief of Plaintiff in Error). We presume the authors based their note upon the expression of Judge Moore, as above quoted, in the case of Hughes v. The State of Texas, as no other utterance on the subject by a Texas court can be found. No more concise expression of our views on this point in the case and the principles governing it can be given than by quoting the language of the late lamented

Chief Justice of Texas in the well considered case of W. U. Tel. Co. v. State of Texas, 62 Texas, 633, 634:

"It does not necessarily follow, because a statute is void in part that it is void *in toto;* for some of its provisions, not liable to any constitutional objection, may be separate and distinct from the parts which are void, and so complete within themselves, and so clearly evidencing the legislative intention in reference to the subject to which they relate that they may stand without reference to the parts which are void. The rule is thus well stated. 'When, therefore, a part of a statute is unconstitutional, that fact does not authorize the court to declare the remainder void also, unless all the provisions are connected in subject matter, dependent on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the Legislature would have passed the one without the other. The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last fall. The point is not whether they are contained in the same section, for the distribution into sections is purely artificial; but whether they are essentially and inseparably connected in substance. If, when the unconstitutional portion is stricken out, that which remain is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must stand.'" (Cool. on Const. Lim., 215.)

In the case of Keokuk N. L. Packet Co. v. Keokuk, 95 U. S., 377, and Presser v. People of Ill., 116 U. S., 615, the Supreme Court of the United States seems to go still further, and says in so many words that "statutes that are constitutional in part only will be upheld so far as they are not in conflict with the constitution, provided the allowed and prohibited parts *are severable.*"

It cannot be seriously questioned that provisions setting forth the manner of judicially determining what lands have escheated to the State are *severable* from those providing what shall be done with the land after the State has secured it. Hence we claim that the act of 1848, at least in so far as it prescribed a method for judicially determining what lands escheated to the State, was in full force when the decree was rendered in the escheat pro-

ceeding relied on by the defendants in this cause, and that an outstanding title was thus established which would defeat plaintiff's action.

Let the judgment rendered in the escheat proceeding be read down to where it directs the seizure and sale of the property by the sheriff and the balance omitted as void even, and the part so read is a complete and perfect judgment, vesting title in the State, one in accordance with the statute and Constitution, and yet as destructive of plaintiffs' right to recover as though the entire proceedings were held good. If void to *any* extent (a point we will discuss later on), the judgment was void only in so far as it attempted to enforce the eleventh section of the Act of 1848.

It is an every day practice of our courts of last resort to affirm judgments in part and reverse in part, and if the judgment in question had been taken to the Supreme Court of Texas upon that assignment it would simply have been reversed and reformed so as to leave off the part ordering the seizure and sale of the land.

SECOND PROPOSITION COUNTER TO FIRST, SECOND AND THIRD PROPOSITIONS OF PLAINTIFFS IN ERROR:

If the act of 1848 had been wholly repealed by the Constitution of 1869, the escheat proceeding in this case was still valid, at least in so far as it vested title in the State of Texas.

At common law possession of escheated property was vested in the lord by inquest of office. Escheat is described as a species of title by purchase (2 Blackstone, 244), and by the English common law, the lord (and in Texas, the State) acquires the title to escheated property, *because* of the failure of heirs it is true, but only after a judgment ascertaining such failure and vesting the property in the lord or State. When such judgments are rendered they affect the *status* of the property and cut off or bar the heirs of the ancestor (3 Blackstone, 194); in Commonwealth v. Hils, 6 Leigh (Va.), 594, it is said:

"It is a well established maxim of English law that the king can neither take nor part from anything but by matter of record; therefore, for the purpose of affording this authentic evidence of his rights, where they have devolved upon him by matter *in pais*, as by dying seized without heirs, etc., inquests of office were de-

vised; their effect (inquests of office) is to vest the possession in the crown by office only."

In 2 Plowden, 486, 3 Coke Rep., 10, it is said: "That there must be an office of inquisition before the title vests in the commonwealth will be apparent, if those rules of construction be applied which have invariably governed the English courts in expounding their acts of parliament in declaring forfeitures to the king."

In Barbour v. Nelson, 1 Littell (Ky.), 60, the reason assigned is that it is a part of the liberties of England and greatly for the safety of the subject that the king may not enter upon or seize any man's possession upon bare surmise without the intervention of a jury.

In Wilbur v. Tobey, 16 Pick., 180, it is said: "But where a subject dies intestate, as the estate descends to collateral kindred indefinitely, the presumption of law is, that he has heirs, and this presumption will be good against the commonwealth until they institute the regular proceedings by inquest of office, by which the fact whether the intestate did or did not die without heirs can be ascertained, and if the fact is established in favor of the commonwealth, it rebuts the contrary presumption, and the commonwealth, by force of the judgment, and of the statute before cited (concerning escheat) became seized in law and in fact. *In such case, therefore*, the courts are of opinion, that an inquest of office is necessary, and that the commonwealth cannot be deemed to be seized without such inquest." To the same effect will be found the cases of Gresham v. Rickenbacker, 28 Ga., 227; State v. Tilghman, 14 Iowa, 474; Sands v. Lynham, 27 Va., 291; Wallahan v. Ingersoll, 22 Rep. (Ill.), 514; McCreery v. Alexander, 4 Harris & McHenry, (Md.), 419; People v. Folsom, 5 Cal., 375; Bradstreet v. Supervisors, 13 Wend., 546; Jackson v. Adams, 7 Wend., 367.

The common law having been adopted in Texas long prior to the Constitution of 1869, and that Constitution (Sec. 7, Art. V) having in so many words conferred upon the district court original jurisdiction of all cases in behalf of the State to recover escheats, our contention is that said court could (under the Constitution of 1869) proceed to adjudge property escheated to the State without any legislative enactment on the subject, provided, of course, it had jurisdiction over the person and property. The

Constitution of 1869 contemplated the recovery of escheated land *by suit*, for it confers on the district court jurisdiction over such suits.

This suit was instituted in Fayette county where the land was situated, which gave the court jurisdiction over the subject matter, the act of May 13, 1846, as the present law, providing that: "11th. In cases where the recovery of land, or damages thereto, is the suit, in which case suit must be instituted where the land or a part thereof is situated." (Paschal's Dig. of Laws, Art. 1423.) The court had acquired jurisdiction over the heirs of Walter Hamilton by complying with the provisions of the act of 1848 long prior to the adoption of the Constitution of 1869 (Agreed Rec., p. 3); and even if this were not true, the district court being a court of general jurisdiction (as we will show hereafter), and there being nothing in the record to show *affirmatively* that the court had no jurisdiction of the persons, the presumption that it did have such jurisdiction *is conclusive*. (Galpin v. Page, 18 Wall., 350; Fitch v. Boyer, 51 Texas, 344; Lawler v. White, 27 Texas, 250.)

Plaintiffs in error cite Hancock v. McKinnly, 7 Texas, 445; Swift v. Herrera, 9 Texas, 279; and Jones v. McMartens, 20 How., 21, apparently to show that no lands could be forfeited or escheated without an act of the legislature. It will be observed that in all three cases the effort was being made by private individuals to take advantage of alleged forfeitures so as to validate claims which had arisen subsequent to the alleged forfeiture; in none of the cases had the *State of Texas* attempted to enforce any forfeiture, and the gist of the decisions is that private individuals could not inquire into it.

In Swift v. Herrera the court says: "The Constitution of the State, in Sec. 4, Art. XIII, requires the Legislature to provide a method for determining what lands may have been forfeited and escheated. No law prescribing the mode of ascertaining forfeitures has yet been adopted. The courts have not been authorized to permit, *at the instance of individuals*, inquiries into the causes of forfeiture of grants, and to annul them or recall the titles, on proof that the forfeiture has been incurred; and there was no error in striking out such portion of the pleading as would have let in proof to establish facts of this character. That individuals cannot, since the adoption of the State Consti-

tution, by location assert any right to lands previously granted, on the grounds simply of forfeiture, was fully decided in the case of Hancock v. McKinney; and the principles of that decision are conclusive, in support of the ruling of the court, now under consideration."

In the case of Jones v. McMasters, the court disposes of the matter in this language: "By the 4th Section of the 13th Article (Const. of 1845) it is provided 'that all fines, penalties, forfeitures, and escheats, which have accrued to the Republic of Texas under the Constitution and laws, shall accrue to the State of Texas; and the Legislature shall, by law, provide a method for determining what lands may have been forfeited or escheated.' It is understood that the Legislature of Texas has not yet passed any law providing for the steps to be taken to give effect to escheats for alienage or otherwise—at least no such law has been referred to or relied on in the argument; and the course of decision in the State of Texas appears to be that, until some act of the Legislature is passed on the subject, effect cannot be given to the plea of alienage, or at least that some proceeding must be had on the part of the government divesting the estate for this cause before effect can be given to it."

It will further be noted that these three cases arose under the Constitution of 1845 which required "that the Legislature *shall*, by law, provide a method for determining what lands *may have been* forfeited or escheated."

Considering the connection in which the language is used and the language itself, it would appear that the Legislature was *required* to provide a method for determining what lands may have been forfeited or escheated *to the Republic of Texas;* and, therefore, as to the forfeiture or escheat of *all such lands*, but no further legislation may have been required.

However, under the constitution of 1869 the Legislature was *not* required to provide a method for escheating any character of property; but the district court was given jurisdiction of all causes to recover escheats.

Therefore no legislation was necessary to empower the district court of Fayette county to vest in the State of Texas the Walter Hamilton league of land.

THIRD PROPOSITION COUNTER TO FIRST, SECOND AND THIRD PROPOSITIONS OF PLAINTIFFS IN ERROR:

The district court of Fayette county being a court of general jurisdiction, and the escheat proceeding being a case in which it had jurisdiction of the subject matter and of the parties, its judgment, no matter how erroneous, is not void and subject to collateral attack.

That the district court is now, and ever has been, a court of general jurisdiction has never been, and will not now, be questioned (Fitch v. Boyer 51 Texas, 336; Tennell v. Breedlove, 54 Texas, 540; Const. of 1869, Art. V, Secs. 1 and 7); that jurisdiction over causes in behalf of the State to recover escheats was specifically vested in it is shown by Sec. 7, Art. V of the Constitution of 1869, as heretofore quoted, as also by Sec. 10, Art. IV of the Constitution of 1845; it was a suit between proper parties, the State of Texas and the plaintiffs in this suit (heirs of Walter Hamilton). Suit was filed in the district court of the county "where such succession is required to be opened" (Agreed Rec., p. 3), as is required by Sec. 2 of the act of 1848, and every step, as to acquiring jurisdiction, was taken in strict accord with the provisions of the act of 1848 (Agreed Rec., pp. 3, 4 and 5); if the act of 1848 was *not* repealed by the Constitution of 1869, or *was* repealed only as to *Section 11*, then the court assuredly had jurisdiction of the subject matter and of the parties; if the act of 1848 *was* repealed *in toto* by the Constitution of 1869, jurisdiction had been acquired of the subject matter and of the parties prior to 1869 (Agreed Rec., p. 3); if the act of 1848 *was* repealed *in toto* by the Constitution of 1869 and jurisdiction of the subject matter and of the parties had *not* been acquired *prior to 1869*, *still* the court had jurisdiction of the subject matter under Sec. 11 of the act of May 13, 1846 (which is substantially the same as the present law); "In cases where the recovery of land, or damages thereto, is the subject of a suit, in which case suit must be instituted where the land or a part thereof is situated." (Paschal's Dig. of Laws, Art. 1423.) This suit having been brought in Fayette county, where the land was situated (Agreed Rec., p. 5), and being a suit for "the recovery of land;" and the court must be held to have had jurisdiction of the persons *in any event*, since the judgment is that of a court of general jurisdiction, and there is nothing in the record to show

affirmatively that the court had no jurisdiction of the persons, in the absence of which the presumption that it *did* have such jurisdiction is conclusive. (Galpin v. Page, 18 Wall., 350; Fitch v. Boyer, 51 Texas, 344; Lawler v. White, 27 Texas, 250.)

The rule of law has been succinctly stated as follows: "When a judgment of a court of general jurisdiction is offered as evidence in a collateral suit, the judgment, however erroneous, is admissible, and is conclusive upon the point to which it speaks, unless it is made affirmatively to appear that the court which rendered it had no jurisdiction of parties or subject matter." We believe this rule is fundamental, and cite as further sustaining it: Elliot v. Piersall, 1 Pet. (U. S.), 340; Peck v. Jenness, 7 How., 624; McNitt v. Turner, 16 Wall., 366; Nash v. Williams, 20 Wall., 246; Freeman on Judg., Sec. 135 and note 5.

FOURTH PROPOSITION COUNTER TO FIRST, SECOND AND THIRD PROPOSITIONS OF PLAINTIFFS IN ERROR:

A judgment, erroneous because it enforces an unconstitutional law, is not void for that reason, but voidable, and can be attacked only by a direct proceeding brought at the proper time and in the proper way to vacate it.

We know of no reason in principle, nor have we found any in authority, making an exception to the general rule against a judgment erroneous because enforcing an unconstitutional law.

FIRST PROPOSITION COUNTER TO FOURTH PROPOSITION OF PLAINTIFFS IN ERROR:

An act providing for the vesting of the title to escheated property in the State without compensation to possible heirs, who might arise, is not unconstitutional.

We suppose that Plaintiffs in error base their fourth proposition upon Art. 1, Sec. 14, of the Constitution of 1869, though they do not say so. That section provides, among other things, that "no person's property shall be taken or applied *to public use* without just compensation being made, unless by the consent of such person." We submit: 1. That this language has no relation to the subject under discusion—escheat. 2. That in case it had, the judicial determination provided for in the act, that the land was subject to escheat, *established* the fact that there was no person *in esse* to be deprived of the property. 3. The validity

of escheat laws is not affected by the disposition of the property or its proceeds. The objection Plaintiffs in Error raise by their fourth proposition would prevail against any escheat law which could be passed.

It may be stated, as a general proposition and one worthy of all acceptation, that it is merely a matter of *grace* on the part of the State when it allows heirs to come in, after escheat has been declared, and claim the proceeds of sale of escheated property; and the fact that the State does, or does not allow this privilege, in no way affects the validity of the escheat law. The Statute of New Jersey (compiled in accordance with act of April 4, 1871), provides that the money, for which escheated property is sold, shall be paid to the Treasurer, and there is no provision for the benefit of heirs who may afterward appear (p. 377); Rev. Stat. of Ind., (1881), Sec. 183, provides that escheated property shall go to the common schools, and we find no provision in favor of heirs who afterwards appears; Rev. Stat. of Ohio (1880), Secs. 4185 and 4166, provides that proceeds of escheated lands shall go to the State Agricultural fund, and we find no provision in favor of possible heirs; in Georgia, the *proceeds* become part of the educational fund and may be recovered by the heirs by suit brought *within six years* (Code of Georgia, Articles 2672 and 2674; according to Code of Iowa of 1860, the *proceeds* are appropriated to public schools and may be recovered by the heirs *within ten years*, but not after; Rev. Stat. of Ill., (1874), p. 480, provide that *proceeds* shall go to county treasurer, and may be claimed by the heirs *within ten years;* Rev. Code of Del. (1874), gives heirs right to reclaim proceeds *within seven years* after sale, and the Rev. Stats. of Ark. (1874), Sec. 2409, gives them a like time.

We have been unable to examine the laws of all the States, but feel warranted in asserting that in all the States either no time at all, or a very limited time, is allowed the heirs within which to claim the property or its proceeds.

So far as we can ascertain, none of these acts have been held unconstitutional or confiscatory.

First Proposition Counter to Fifth Proposition of Plaintiffs in Error:

It having been judicially determined that Walter Hamilton died with-

out heirs. Plaintiffs in Error can not raise that issue in a collateral proceeding.

The court is referred to the Third Proposition Counter to First, Second and Third Propositions of Plaintiffs in Error, and the discussion and authorities thereunder. The court will note that in Hughes v. State, 41 Texas, 19, and Weideranders v. State, 64 Texas, 141, so copiously quoted from in brief of Plaintiffs in Error, the escheat judgments were *directly* and not *collaterally* attacked, hence they have no application to the point in this case. The suggestion that, if an heir should ever appear, any escheat proceeding would at once become void, we do not deem it necessary to discuss further than to refer the court to previous portions of the brief.

SECOND PROPOSITION COUNTER TO FIFTH PROPOSITION OF PLAINTIFFS IN ERROR:

The averments of defendants' first supplemental answer were amply sufficient.

It is distinctly stated in defendant's first supplemental answer that "Walter Hamilton, late a resident of Fayette county, in said State (Texas), died on the — day of — A. D. —, *intestate and without heirs*, and that no letters of administration have ever been granted upon said decedent's estate in Fayette county, in which succession should, according to law, have been opened." (Agreed Rec., p. 3.)

Also every other allegation necessary to fully comply with the law duly appears. (Agreed Rec., pp., 2–5.) We wholly fail to see the application of the authorities cited by Plaintiffs in Error. Isolated extracts from the opinion in Wiederanders v. State, 64 Texas, 133, might possibly seem to support their position, but the opinion, as a whole, is clearly in support of our position in part, and inapplicable as to the remainder. It was a direct proceeding to set aside an escheat judgment, and the court says on page 137: "*The mere institution of the proceeding* creates no presumption that there is no one capable of taking the estate under the rules regulating the descent of estates of deceased persons—the presumption is to the contrary; and the effect of the judgment, if rendered after all persons interested in the estate are notified of the pendency and purpose of the proceeding in the only manner in which they can be, if unknown (viz: by publi-

cation of notice), is to destroy that presumption and make the title of the State clear."

From the time the property is sold under a valid decree, the claim of the person who might have taken it as heir, devisee, or legatee, is against the proceeds of the property, which must be paid into the State treasury (R. S., 1780–1785), and to recover even that he is driven to a suit.

It is certainly not the intention that the purchaser of escheated lands shall be subjected to the peril of losing them, after they have been regularly escheated and sold, if an heir, devisee, or legatee shall subsequently make claim; nor that personalty, which, from day to day, changes hands, shall be subject to the claims of such persons, however valid such claim may have been *if asserted in proper time and place;* yet such results would follow if the jurisdiction of the court is not so brought into exercise by a substantial compliance with the requisites of the statute as to clothe it with power, by its judgment, *to conclusively settle the title to the property as against all persons.*

"Such power can only exist when the requirements of the statute are substantially complied with."

They were substantially complied with in this instance and the power existed, and if they had not been, it is now too late to raise the question in collateral proceeding.

We desire to state just here, that the escheat judgment relied on by defendants in error, was reviewed and affirmed on appeal by the Supreme Court of Texas, and is reported in Vol. 36, p. 282, etc., of Texas Reports, the style of the case being Brown v. State.

In reply to *proposition six of plaintiffs in error*, we only deem it necessary to say, that if the proposition is good law, then every escheat law which has been passed by an American State is likewise unconstitutional for the same reason. Section 10, Art. 2 of the Constitution of the United States could, by no possible construction, apply to escheat laws.

The judgment should be affirmed.

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